TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 214

MILLER MUSIC CORPORATION, PETITIONER,

vs.

CHARLES N. DANIELS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 2, 1959

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILLER MUSIC CORPORATION, Plaintiff-Appellant,

against

CHARLES N. DANIELS, INC., Defendant-Appellee.

STATEMENT UNDER RULE 15 (b)

This suit was commenced by the filing of the complaint on June 29, 1954. The names of the original parties appear in the above caption. The answer of the defendant was filed on July 20, 1954. The defendant was not arrested, no bail was taken, and its property was not attached.

On April 10, 1957, the plaintiff made a motion, pursuant to Rule 56, F.R.C.P., for summary judgment as prayed for in the complaint and dismissing the counterclaims in defendant's answer. On April 18, 1957, the defendant made a cross motion, pursuant to Rule 56, F.R.C.P., for summary judgment dismissing the complaint. On January 4, 1958, the Honorable Frederick von Pelt Bryan, District Judge, filed his opinion denying plaintiff's motion and granting defendant's motion, and pursuant thereto judgment was entered on February 28, 1958 dismissing the complaint.

Plaintiff's notice of appeal was filed on March 11, 1958, the posting of a bond having been waived by defendant as provided in the judgment.

The plaintiff appeared by Abeles & Bernstein. The defendant originally appeared by Lee V. Eastman. Lewis A. Dreyer and Jack M. Ginsberg were substituted as attorneys for defendant pursuant to an order entered on April 5, 1957.

[fol. 2]

Appendix to Appellant's Brief for the Southern District of New York

In United States District Court

Complaint—filed June 29, 1954

Plaintiff, by its attorneys, Abeles & Bernstein, respectfully alleges:

1. The action arises under the Act of March 4, 1909, c. 320, 35 Stat. 1075 *et seq.*, U.S.C. Title 17, and the amendments thereto, as codified and enacted into positive law by the Act of July 30, 1947, c. 391, 61 Stat. 652, and the amendments thereto, and the Act of June 25, 1948, c. 646, 62 Stat. 931, U.S.C. Title 28, Sec. 1338, as hereinafter more fully appears.

2. Plaintiff and defendant are corporations incorporated under the laws of the State of New York.

3. Prior to January 10, 1925, Ben Black and Charles Neil Daniels, also known as Neil Moret, each of whom then was and during his lifetime continued to be a citizen of the United States, created and wrote an original musical composition entitled "Moonlight and Roses (Bring Mem'ries of You)."

4. This musical composition, the music of which was in part adapted from a musical work entitled "Andantino In D Flat," with the consent of the proprietor of the then copyright therein, contains a large amount of material wholly original with said Ben Black and Charles Neil Daniels and is copyrightable subject matter under the laws of the United States.

5. Prior to January 10, 1925, said Ben Black and Charles Neil Daniels duly assigned to Villa Moret, Inc., a music publisher, said musical composition and the right to secure copyright thereof in its name.

[fol. 3] 6. Between January 9, 1925 and January 16, 1925, said Villa Moret, Inc. duly complied in all respects with all

laws of the United States governing copyright then in force, and secured the exclusive rights and privileges in and to the copyright of said musical composition, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Jan. 10, 1925, Class Exxxe No. 605065."

7. From January 10, 1925, and for the balance of the original term of copyright therein, said musical composition was published by or under the authority of said Villa Moret, Inc. and all copies of it made by said Villa Moret, Inc. or under its authority or license were printed, published and offered for sale in strict conformity with the provisions of all laws of the United States governing copyright then in force.

8. For a valuable consideration, by an instrument in writing dated and executed in the United States on October 14, 1946 and duly recorded in the Copyright Office of the United States on October 27, 1946, said Ben Black duly assigned to plaintiff all his rights, title and interest in and to all renewal copyrights in said musical composition, and covenanted, undertook and agreed to make and execute any and all further instruments, documents and writings for the purpose of perfecting and conforming such rights, title and interest in plaintiff.

9. Said Ben Black died in the State of California on December 26, 1950, being more than one year prior to the expiration of the original term of copyright in said musical composition, leaving no widow or children, and pursuant to said instrument of October 14, 1946 bequeathed by will the right of his brother David Black and the Bank of America, National Trust And Savings Association, as co-[fol. 4] executors to apply for the renewal of said copyright in said musical composition for and on behalf of plaintiff.

10. The said Bank of America, National Trust And Savings Association, having renounced its right to act as co-executor of said will, the said David Black qualified in the State of California as the sole executor thereof.

11. The original and renewal term of copyright, in said musical work entitled "Andantino In D Flat," expired prior to January 9, 1953.

12. The original term of copyright in said musical composition entitled "MOONLIGHT AND ROSES (BRING MEM'RIES OF YOU)" expiring on January 9, 1953, said David Black as the executor of said will became entitled to and secured for and on behalf of plaintiff the rights, title and interest through said Ben Black as a co-writer of said musical composition in and to the renewal and extension of the copyright therein for a further term of twenty-eight years, by complying with all laws of the United States governing copyright then in force, including the making of application therefor to the Copyright office and registering the same therein on January 16, 1952, being within one year prior to the expiration of the original term of copyright therein, and received from the Register of Copyrights a certificate of registration dated and identified as follows: "Jan. 16, 1952, Class R No. 88745."

13. Since January 16, 1952, plaintiff has been and still is the sole owner and proprietor of all rights, title and interest through said Ben Black in and to the said renewal copyright in said musical composition.

14. Continuously, since in or about the month of February, 1953, defendant has claimed and asserted that, by [fol. 5] virtue of a purported assignment from said David Black as the executor of said will, made subsequent to January 16, 1952, it is the sole owner and proprietor of all rights, title and interest through said Ben Black in and to the said renewal copyright in said musical composition, and that plaintiff is not possessed of any rights, title or interest whatsoever therein or thereto.

15. Defendant, acting under the said purported assignment, has made and continues to make such claim and assertion to the public, the trade, potential users and licensees, and certain agents and agencies through whom and which music publishers, including plaintiff and defendant, exercise rights and grant licenses to their musical compositions, and that defendant is thereby solely and exclu-

sively entitled to exercise all rights and grant all licenses in respect to all rights, title and interest through said Ben Black in and to said renewal copyright and to the payment of all royalties and fees accruing therefrom, and that plaintiff is not possessed of any rights, title or interest whatsoever therein or thereto.

16. Defendant has thereby prevented plaintiff from exercising and licensing such rights, has deprived plaintiff of all rights, title and interest through said Ben Black in and to said renewal copyright, and has thereby infringed and destroyed the rights, title and interest of plaintiff through said Ben Black in and to said renewal copyright.

17. A copy of said copyrighted musical composition is hereto annexed as "Exhibit A."

18. Plaintiff has notified defendant that defendant has thereby infringed and destroyed the rights, title and interest of plaintiff through said Ben Black in said musical copyright, and defendant has continued such acts on its part.

[fol. 6] Wherefore, plaintiff demands:

(1) That defendant, its agents, and servants be enjoined during the pendency of this action and permanently (a) from infringing and destroying the rights, title and interest of plaintiff through said Ben Black in said renewal copyright in any manner, and (b) from asserting and claiming that defendant is the owner or proprietor of any rights, title or interest through said Ben Black in said renewal copyright, and from exercising any rights or granting any licenses in respect to any such rights, title or interest.

(2) That defendant assign to plaintiff the rights, title and interest through said Ben Black in said renewal copyright, allegedly acquired by defendant under the said purported assignment from said David Black as the executor of the will of said Ben Black.

(3) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement and destruction of the rights, title

and interest of plaintiff through said Ben Black in said renewal copyright and to account for all gains, profits and advantages derived by defendant by its infringement and destruction of the rights, title and interest of plaintiff through said Ben Black in said renewal copyright or such damages as to the Court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorneys' fees to be allowed to the plaintiff by the Court.

(5) That plaintiff have such other and further relief as is just.

[fol. 7]

NOTE RE: EXHIBIT A, ANNEXED TO COMPLAINT

COPY OF MUSICAL COMPOSITIONS

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACTS AND CONCLUSIONS OF LAW—March 18, 1957

The attorneys for the respective parties hereby stipulate and agree that the following facts and conclusions of law are admitted for all purposes of this action:

1. The action arises under the Act of March 4, 1909, c. 320, 35 Stat. 1075 *et seq.*, U.S.C. Title 17, and the amendments thereto, as codified and enacted into positive law by the Act of July 30, 1947, c. 391, 61 Stat. 632, and the amendments thereto, and the Act of June 25, 1948, c. 646, 62 Stat. 931, U.S.C. Title 28, Sec. 1338.

2. Plaintiff and defendant are New York corporations each of which is in business as a music publisher.

3. Prior to January 10, 1925, Ben Black (hereinafter referred to as "Decédent") and Charles Neil Daniels (also known as Neil Moret), both of whom then were and during their respective lifetimes continued to be citizens of the United States, wrote an original musical composition en-

titled "Moonlight and Roses (Bring Mem'ries of You)" (hereinafter referred to as "Said Composition").

4. The music of Said Composition was in part adapted from a work entitled "Andantino in D Flat," with the consent of the owner of the then copyright therein, but contains a large amount of material wholly original with Decedent [fol. 8] and Charles Neil Daniels, and was and is copyrightable subject matter under the laws of the United States.

5. Prior to January 10, 1925, Decedent and said Charles Neil Daniels duly assigned to Villa Moret, Inc., a music publisher, Said Composition and the right to secure copyright therein in its name.

6. Between January 9, 1925 and January 16, 1925, said Villa Moret, Inc. duly complied in all respects with all laws of the United States governing copyright then in force, and secured the exclusive rights and privileges in and to copyright of Said Composition, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Jan. 10, 1925, Class Exxxc No. 665065."

7. From January 10, 1925, and for the balance of the original term of copyright therein, expiring January 9, 1953, Said Composition was published by or under the authority of said Villa Moret, Inc., and all copies of it made by said Villa Moret, Inc. or under its authority or license were printed, published and offered for sale in strict conformity with the provisions of all laws of the United States governing copyright then in force.

8. Under date of October 3, 1946, Decedent entered into a written agreement with plaintiff, a copy of which is annexed hereto as "Exhibit A" and made a part hereof. Under said agreement, among other things, Decedent assigned to plaintiff all Decedent's rights and interests, then or thereafter in existence, in the renewal and extension of the United States copyright in Said Composition, and in consideration of acquiring said rights and interests plaintiff agreed to pay Decedent certain royalties and the sum of $1,000.00 on account and in advance of said royalty payments.

[fol. 9] 9. Said sum of $1,000.00 was actually paid to Decedent by plaintiff upon the signing of said agreement "Exhibit A," annexed.

10. On October 14, 1946, Decedent and Decedent's brothers David Black, Jules Black and Isidore Black, each executed separate instruments, copies of which are annexed hereto as "Exhibit A-1," "Exhibit A-2," "Exhibit A-3" and "Exhibit A-4" and made a part hereof, whereunder each on behalf of himself and all other parties in interest assigned to plaintiff all rights and interests whatsoever, then or thereafter in existence, in the renewal and extension of the United States copyright in Said Composition. In said assignments each of said assignors further covenanted to make and execute any and all further instruments, documents and writings for the purpose of perfecting and confirming such rights and interests in plaintiff. Said instruments of assignment were made and delivered pursuant to, and as part of, said agreement "Exhibit A," annexed.

11. Said five instruments, "Exhibit A," "Exhibit A-1," "Exhibit A-2," "Exhibit A-3" and "Exhibit A-4" annexed, were duly recorded in the Copyright Office on October 27, 1946.

12. Under date of June 1, 1950, Decedent made a will a copy of which is annexed hereto as "Exhibit B" and made a part hereof.

13. Decedent died in the State of California on December 26, 1950, leaving no widow or children. His said will, "Exhibit B" annexed, was duly admitted to probate in the Superior Court of the State of California on February 15, 1951.

14. Said will, "Exhibit B" annexed, named Decedent's brother, David Black (one of the assignors referred to in [fol. 10] paragraph "10" of this stipulation) and The Bank of America, National Trust and Savings Association, as co-executors of said will. The Bank of America, National Trust and Savings Association, renounced its right to act as co-executor, and David Black qualified as the sole executor of Decedent's said will.

15. On January 16, 1952, within one year prior to the expiration of the original term of copyright in Said Composition, David Black, as sole executor of Decedent's estate, applied to the Copyright Office for the renewal and extension of the copyright therein and received from the Register of Copyrights a certificate of registration of said application for renewal, dated and identified as follows: "Jan. 16, 1952, Class R No. 88745," a copy of which is annexed hereto as "Exhibit C" and made a part hereof.

16. On March 24, 1952, final distribution of all property whatsoever in the estate of Ben Black was decreed by the Superior Court of the State of California. A copy of such decree of said Court for final distribution is annexed hereto as "Exhibit D" and made a part hereof.

17. The original term of the copyright in Said Composition expired on January 9, 1953, more than one year following the death of Decedent.

18. The renewal term of copyright in the said musical composition entitled "Andantino in D Flat" had expired prior to January 9, 1953.

19. Under date of May 1, 1952, defendant entered into an agreement with certain nephews and nieces of Decedent. A copy of said agreement as filed in the Copyright Office April 15, 1953 is annexed hereto as "Exhibit E" and made a part hereof and a copy of said agreement as filed in the Copyright Office January 18, 1954 is annexed hereto as "Exhibit E-1" and made a part hereof. In said agreement, among other things, said nephews and nieces of Decedent [fol. 11] assigned to defendant all their right, title and interest in Said Composition. Upon the petition of David Black as executor of Decedent's estate said agreement between defendant and said nephews and nieces of Decedent was approved by order of the Superior Court of the State of California dated June 23, 1952, copy of which is annexed hereto as "Exhibit F" and made a part hereof. As submitted to the Superior Court for approval said agreement was not signed by said executor.

20. On May 6, 1947, defendant entered into an agreement with Neil M. Daniels and Tholen D. Garrett, children

of Charles Neil Daniels (also known as Neil Moret), the co-author of Said Composition. A copy of said agreement is annexed hereto as "Exhibit G" and made a part hereof. Attached hereto as "Exhibit G-1" is copy of assignment from the said Daniels and Garrett to defendant, filed in Copyright Office, Vol. 639, page 98.

21. The said Neil M. Daniels and Tholen D. Garrett applied to the Register of Copyrights for the renewal and extension of the copyright in Said Composition and received from the Register of Copyrights a certificate of registration of said application for renewal, dated and identified as follows: "Jan. 21, 1952, Class R No. 9037," a copy of which is annexed hereto as "Exhibit H" and made a part hereof.

22. Plaintiff claims that it is the sole owner and proprietor of all rights, title and interest through Decedent in and to the United States renewal copyright in Said Composition.

23. Defendant claims that it is the sole owner of the United States renewal copyright in Said Composition by having acquired the right, title and interest therein of (a) the executor and residuary legatees of Decedent's estate, and (b) the children of Charles Neil Daniels, the co-author of said Composition.

[fol. 12] 24. Defendant has made such claim, and the claim that plaintiff has no right, title or interest whatsoever in the renewal copyright in Said Composition to potential users and licensees and to certain agents and agencies through whom music publishers exercise rights and grant licenses to their musical compositions, thereby preventing plaintiff from exercising and licensing such rights and depriving plaintiff of all rights, title and interest through said Ben Black in and to said renewal copyright.

25. Plaintiff has notified defendant that defendant has infringed and destroyed its said rights and interests and defendant has continued its acts.

26. On the hearing of the motion for summary judgment in this matter the following original and/or certified copies of documents will be handed up to the Court:

(a) Renewal registration of "MOONLIGHT AND ROSES," No. R 88745, dated January 16, 1952, claimed on behalf of David Black, Executor of the Estate of Ben Black ("Exhibit C");

(b) Renewal registration of "MOONLIGHT AND ROSES," No. R 90371, dated January 21, 1952, claimed by Neil M. Daniels and Tholen D. Garrett, as children of Neil Moret;

(c) Exemplified copy of proceedings in the matter of the Estate of Ben Black (also known as Bernard Black), Deceased, in the Superior Court of the State of California, in and for the City and County of San Francisco.

Dated: New York, N. Y.
March 18, 1957.

ABELES & BERNSTEIN,
Attorneys for Plaintiff

LEWIS A. DREYER &
JACK M. GINSBERG
Attorneys for Defendant

[fol. 13]

EXHIBIT A, ANNEXED TO AGREED STATEMENT

FOR AND IN CONSIDERATION of One Dollar and other good and valuable considerations paid by MILLER MUSIC CORPORATION (formerly Miller Music, Inc.) (hereinafter referred to as "Miller"), to BEN BLACK (hereinafter referred to as "Black"), receipt whereof is hereby acknowledged, and of the premises, Black hereby bargains, sells, transfers, assigns and sets over to Miller, everywhere, forever and without limitation, any and all rights and interests whatsoever, now or at any time or times hereafter known or in existence, now possessed or which may at any time or times hereafter be acquired or possessed by Black, in or to the following entitled musical compositions:

(Titles of Musical Compositions)

and in or to any and all adaptations, arrangements, translations and versions thereof, and including among all other

things and without limitation, any and all rights and interests in and to any and all original copyrights therein and all renewals and extensions thereof and for and during every period in respect of which copyrights may subsist beyond the original terms thereof, throughout the world (all of the foregoing being hereinafter referred to as "said compositions"), together with the right, power and authority to make any versions, omissions, additions, changes, substitutions, adaptations, arrangements, dramatizations and translations of in and to said compositions and the titles, words and music thereof.

In consideration of Miller acquiring the rights to said compositions as in this instrument provided, Miller will pay or cause to be paid to Black during the respective periods of all renewals and extensions of the copyrights in each of said compositions, the following compensation as royalties and fees, provided, however, that as to each of said compositions as to which Black is not the sole writer [fol. 14] and composer, then Miller will pay Black only a proportionate share thereof in proportion to the total number of writers and composers (irrespective of whether or not Miller has acquired or may acquire their rights and interests therein) i.e., one-half if there are two writers and composers, one-third if there are three writers and composers, and one-fourth if there are four writers and composers:

3¢ for each regular piano copy and for each orchestration of said compositions sold by Miller, paid for and not returned in the United States of America and the Dominion of Canada;

50% of all net moneys received by Miller in respect of any licenses issued authorizing the manufacture of parts of instruments serving to mechanically reproduce said compositions or to use said compositions in television or in synchronization in sound motion pictures or to reproduce the same upon so-called electrical transcription for broadcasting purposes; and of any and all receipts of Miller from any other source or right now known or which may hereafter come into existence for

which specific provision for payment is not made in this instrument, except from rights of public performance and broadcasting;

$25. for the use of said compositions in each folio or composite work, sold by Miller, paid for and not returned in the United States of America and the Dominion of Canada, in lieu of any other payment therefor; and

50% of all moneys received by Miller in respect of regular piano copies and/or orchestrations thereof and in respect of the use of said compositions in any folio or composite work, sold and paid for in any foreign country.

[fol. 15] Anything to the contrary notwithstanding, payment by Miller or any of its successors or assigns to all such other writers and composers of said compositions shall be conditioned upon Miller or its successors or assigns having acquired or acquiring their respective interests in said compositions for the renewal periods of copyright, the amount of all such payments to be the amount, if any, specified in the respective instruments under which such rights were or are acquired by Miller or its successors or assigns.

In further consideration of Miller acquiring the rights to said compositions as in this instrument provided, free and clear of all claims and encumbrances, Miller has paid to Black upon the execution of this instrument, the sum of $1000.00, receipt whereof is hereby acknowledged, which shall be on account and in advance of all royalties and fees whatsoever to become payable by Miller, its successors and assigns, to Black in respect of said compositions. Miller or its successors or assigns shall not be obligated for the payment of any further moneys in respect to said compositions until it shall have first recouped said advance payment of $1000.00 from such royalties and fees.

During such period as moneys may accrue to Black under this agreement, Miller shall render itemized statements and make payment to Black of such moneys (after the advance payment of $1000.00 shall have been earned and recouped) within forty-five days after June 30th and

December 31st of each year for the preceding semi-annual periods. Black or his representative may appoint a certified public accountant who shall at any time during usual business hours have access to all records of Miller relating to said compositions for the purpose of verifying royalty statements rendered or which are delinquent under the terms hereof.

In all respects this agreement shall be subject to any existing agreements between both of the parties hereto and the American Society of Composers, Authors and Publishers.

[fol. 16] Miller shall have the right to grant, license, transfer, assign, sell and dispose of any and all rights under this instrument. Black covenants, undertakes and agrees, to make, execute and deliver any and all further instruments, documents and writings that may be requested by Miller, its successors and assigns, for the purpose of perfecting and confirming in Miller the rights and interests in all renewals and extensions of the copyrights in said compositions, vested by Black in Miller under this agreement, and Black hereby nominates and appoints Miller and its each and every successor and assign, the true and lawful attorney of Black to make, execute and deliver any and all such instruments, documents and writings in the name of Black, and to renew and extend the copyrights in said compositions and to make application therefor in the name of Black or Miller or otherwise as in every such case made and provided, for and on behalf of Miller and its successors and assigns as the real party in interest therein.

As an inducement to Miller to pay the consideration provided and to exercise the rights under this instrument, Black warrants and represents: That he and only such cowriters and composers as hereinbefore set forth are the sole writers and composers of said compositions; that he has the right to renew and extend the copyrights in said compositions, numbers, works or material, and that said compositions are not in the public domain; that he has never bargained, sold, assigned, transferred, hypothecated, pledged or encumbered any right, title or interest in or to the renewal copyrights in any of said compositions, or the right of renewal or extension thereof. Black makes no

warranty or representation as to the rights of any other writers or composers of said compositions.

IN WITNESS WHEREOF, the said Ben Black has executed this instrument this 3rd day of October, 1946.

BEN BLACK (L.S.)

Confirmed:

MILLER MUSIC CORPORATION

By Abe Olman

[fol. 17]

EXHIBIT A-1, ANNEXED TO AGREED STATEMENT

For and in consideration of One Dollar and other good and valuable considerations in hand paid, receipt whereof is hereby acknowledged, BEN BLACK, for and on behalf of himself and all other parties in interest hereby transfers, assigns and sets over to MILLER MUSIC CORPORATION (formerly Miller Music, Inc.), subject to the terms, covenants and conditions as set forth in an agreement between BEN BLACK and MILLER MUSIC CORPORATION (formerly Miller Music, Inc.), dated October 3, 1946, all rights whatsoever in and to the musical compositions entitled:

(Titles of musical compositions)

under all renewals and extensions of the copyright thereof and in and to the renewals and extensions of the copyright therein, and for and during such time or times copyright may subsist beyond the first period of time (as then provided by law) for which copyright was originally acquired in said compositions, together with all rights and interests in and to all of the foregoing now or at any time or times hereafter known or in existence.

IN WITNESS WHEREOF, the said BEN BLACK has executed this instrument and affixed his seal this 14 day of October, 1946.

BEN BLACK (L.S.)

EXHIBIT A-2, ANNEXED TO AGREED STATEMENT

For and in consideration of One Dollar and other good and valuable considerations in hand paid, receipt whereof is hereby acknowledged, DAVID BLACK, for and on behalf of himself and all other parties in interest hereby trans-
[fol. 18] fers, assigns and sets over to MILLER MUSIC CORPORATION (formerly Miller Music, Inc.), subject to the terms, covenants and conditions as set forth in an agreement between BEN BLACK and MILLER MUSIC CORPORATION (formerly Miller Music, Inc.), dated October 3, 1946, all rights whatsoever in and to the musical compositions entitled:

(Titles of musical compositions)

under all renewals and extensions of the copyright thereof and in and to the renewals and extensions of the copyright therein, and for and during such time or times copyright may subsist beyond the first period of time (as then provided by law) for which copyright was originally acquired in said compositions, together with all rights and interests in and to all of the foregoing now or at any time or times hereafter known or in existence.

The said David Black covenants, undertakes and agrees to make, execute and deliver any and all further instruments, documents and writings that may be requested by Miller Music Corporation (formerly Miller Music, Inc.), and its successors, assigns and licensees; for the purpose of perfecting and confirming any and all rights vested in it hereunder, and he hereby nominates and appoints Miller Music Corporation (formerly Miller Music, Inc.), and its each and every successor and assign, his true and lawful attorney, to make, execute and deliver in his name, all such instruments, documents and writings, and to renew and extend the copyrights in said compositions and to make application therefor in his name or Miller or otherwise as in every such case made and provided, for and on behalf of Miller or its successors or assigns as the real party in interest, this power being coupled with an interest and irrevocable for any cause or in any event whatsoever.

In witness whereof, the said David Black has executed this instrument and affixed his seal this 14 day of October, 1946.

David Black (L.S.)

[fol. 19]

Exhibit A-3, Annexed to Agreed Statement

For and in consideration of One Dollar and other good and valuable considerations in hand paid, receipt whereof is hereby acknowledged, Jules Black, for and on behalf of himself and all other parties in interest hereby transfers, assigns and sets over to Miller Music Corporation (formerly Miller Music, Inc.), subject to the terms, covenants and conditions as set forth in an agreement between Ben Black and Miller Music Corporation (formerly Miller Music, Inc.), dated October 3, 1946, all right whatsoever in and to the musical compositions entitled:

(Titles of musical compositions)

under all renewals and extensions of the copyright thereof and in and to the renewals and extensions of the copyright therein, and for and during such time or times copyright may subsist beyond the first period of time (as then provided by law) for which copyright was originally acquired in said compositions, together with all rights and interests in and to all of the foregoing now or at any time or times hereafter known or in existence.

The said Jules Black covenants, undertakes and agrees to make, execute and deliver any and all further instruments, documents and writings that may be requested by Miller Music Corporation (formerly Miller Music, Inc.), and its successors, assigns and licensees, for the purpose of perfecting and confirming any and all rights vested in it hereunder, and he hereby nominates and appoints Miller Music Corporation (formerly Miller Music, Inc.), and its each and every successor and assign, his true and lawful attorney, to make, execute and deliver in his name, all such instruments, documents and writings, and to renew and

extend the copyrights in said compositions and to make application therefor in his name or Miller or otherwise as in every such case made and provided, for and on behalf [fol. 20] of Miller or its successors or assigns as the real party in interest, this power being coupled with an interest irrevocable for any cause or in any event whatsoever.

IN WITNESS WHEREOF, the said Jules Black has executed this instrument and affixed his seal this 14 day of October, 1946.

JULES BLACK (L.S.)

EXHIBIT A-4, ANNEXED TO AGREED STATEMENT

For and in consideration of One Dollar and other good and valuable considerations in hand paid, receipt whereof is hereby acknowledged, ISIDORE BLACK, for and on behalf of himself and all other parties in interest, hereby transfers, assigns and sets over to MILLER MUSIC CORPORATION (formerly Miller Music, Inc.), subject to the terms, covenants and conditions as set forth in an agreement between BEN BLACK and MILLER MUSIC CORPORATION (formerly Miller Music, Inc.), dated October 3, 1946, all rights whatsoever in and to the musical compositions entitled:

(Titles of musical compositions)

under all renewals and extensions of the copyright thereof and in and to the renewals and extensions of the copyright therein, and for and during such time or times copyright may subsist beyond the first period of time (as then provided by law) for which copyright was originally acquired in said compositions, together with all rights and interests in and to all of the foregoing now or at any time or times hereafter known or in existence.

[fol. 21] The said Isidore Black covenants, undertakes and agrees to make, execute and deliver any and all further instruments, documents and writings that may be requested by Miller Music Corporation (formerly Miller Music, Inc.), and its successors, assigns and licensees, for the purpose of perfecting and confirming any and all rights vested in

it hereunder, and he hereby nominates and appoints Miller Music Corporation (formerly Miller Music, Inc.), and its each and every successor and assign, his true and lawful attorney, to make, execute and deliver in his name, all such instruments, documents and writings, and to renew and extend the copyrights in said compositions and to make application therefor in his name or Miller or otherwise as in every such case made and provided, for and on behalf of Miller or its successors or assigns as the real party in interest, this power being coupled with an interest and irrevocable for any cause or in any event whatsoever.

IN WITNESS WHEREOF, the said Isidore Black has executed this instrument and affixed his seal this 14 day of October, 1946.

ISIDORE BLACK (L.S.)

EXHIBIT B, ANNEXED TO AGREED STATEMENT

I, BEN BLACK, of 791 Lombard Street, San Francisco, California, do hereby make, publish and declare this my Last Will and Testament in manner and form as follows:

FIRST: I hereby revoke all former wills and codicils to wills by me made.

[fol. 22] SECOND: I hereby direct my executors hereinafter named to pay all my just debts and funeral expenses and proper claims and charges against my estate as soon after my demise as can lawfully and conveniently be done.

THIRD: I hereby declare that I am single and that I leave no issue surviving me, and that there is no child of mine now deceased leaving issue now surviving.

FOURTH: I hereby give and bequeath the following sums:

One Thousand Dollars ($1,000.00) to my nephew, TEDDY BLACK of San Francisco, California, should he survive me, but should he predecease me, then this gift shall lapse.

One Thousand Dollars ($1,000.00) to my nephew ROY BLACK of San Francisco, California, should he survive me, but should he predecease me the said sum hereby bequeathed shall go to his issue share and share alike.

FIFTH: The rest, residue and remainder of my estate of every nature, kind or description, real, personal or after acquired, I leave equally to my following named nephews and nieces, it being my express desire that in the event one of them shall predecease me the issue surviving such predeceased nephew or niece shall take the share of such predeceased nephew or niece. The names of my nephews and nieces among whom the rest, residue and remainder of my estate is to be divided are:

MRS. ESTELLE MOSK of San Francisco, California
MRS. ABBY GITTLESOHN of San Francisco, California.
MRS. CECILY PERAZZI of San Francisco
DAVID BLACK of San Francisco, California and
PHILLIP BLACK of San Francisco, California.

SIXTH: I do hereby nominate DAVID BLACK of San Francisco and the BANK OF AMERICA, NATIONAL TRUST AND SAV-
[fol. 23] INGS ASSOCIATION to be the Executors of this my Last Will and Testament. In the event that DAVID BLACK should refuse to act as such Executor, or for any reason become incapable of acting, then in his place and stead I direct that my brother, ISADORE, also known as "ZIZZ" BLACK, shall become Co-Executor with said Bank of America, and in the event that he shall refuse or become incapacitated to so act, then said Bank of American shall be the sole Executor of my estate.

SEVENTH: I do hereby expressly authorize and empower my said Executor to partition, improve, invest, reinvest, assign, transfer, pledge, mortgage, lease, exchange, sell, or otherwise dispose of any property of my estate, real or personal, at public or private sale, with or without notice as it may determine and without the order of any court, and to execute good and valid conveyances and transfers thereof. I further do hereby expressly authorize my Executors to operate and manage any business of which I may die possessed.

EIGHTH: I have purposely made no provision herein for any other person whether claiming to be an heir of mine or not and if any person should claim to be an heir of mine

and as such should assert claim to my estate or any part thereof, of should any person whether a beneficiary under this will or not mentioned herein contest this will or object to any of its provisions, then to such person or persons I hereby give and bequeath the sum of One Dollar ($1.00) and no more in lieu of provisions which I have made or which I might have made herein for such person or persons.

IN WITNESS WHEREOF, I have hereunto set my hand and seal in the City and County of San Francisco, State of California, this 1st day of June, 1950.

BEN BLACK

[fol. 24]

NOTE RE: EXHIBIT C, ANNEXED TO AGREED STATEMENT

Certificate, dated January 16, 1952, of registration of renewal copyright by David Black as executor of the estate of Ben Black.

NOTE RE: EXHIBIT D, ANNEXED TO AGREED STATEMENT

Decree of the Superior Court of the State of California, dated March 24, 1952, settling accounts of executor, and for final distribution.

NOTE RE: EXHIBIT E, ANNEXED TO AGREED STATEMENT

Agreement, dated May 1, 1952, between the residuary legatees under the will of Ben Black and defendant.

NOTE RE: EXHIBIT E-1, ANNEXED TO AGREED STATEMENT

Copy of Exhibit E, as filed in the Copyright Office.

NOTE RE: EXHIBIT F, ANNEXED TO AGREED STATEMENT

Order of the Superior Court of the State of California, dated June 23, 1952, approving agreement of May 1, 1952.

[fol. 25]

NOTE RE: EXHIBIT G, ANNEXED TO AGREED STATEMENT

Agreement, dated May 6, 1947, between Neil M. Daniels and Tholen D. Garrett, children of co-author, and defendant.

NOTE RE: EXHIBIT G-1, ANNEXED TO AGREED STATEMENT

Assignment pursuant to Exhibit G.

NOTE RE: EXHIBIT H, ANNEXED TO AGREED STATEMENT

Certificate, dated January 21, 1952, of registration of renewal copyright by children of co-author.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
—Filed April 10, 1957

Plaintiff Miller Music Corporation moves the Court in the above-entitled cause as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment in favor of plaintiff as prayed for in the complaint and dismissing the counterclaim on the grounds that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Dated, New York, N. Y.
April 3, 1957.

[fol. 26]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
—Filed April 18, 1957

Defendant moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defen-

dant's favor dismissing the complaint, on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

This motion is based upon:

(a) The pleadings on file in this action;

(b) The affidavit of Lewis A. Dreyer, sworn to the 15th day of April, 1957;

(c) The stipulation of fact and Exhibits attached thereto, dated the 18th day of March, 1957.

In United States District Court

Affidavit in Opposition to Defendant's Motion

Herbert N. Gottlieb, being duly sworn, deposes and says:

1. That for the past fifteen years he has been in the employ of plaintiff, Miller Music Corporation, as its office manager.

2. That during said period all process and notices served upon or received by plaintiff or which came to the attention of plaintiff in or concerning any actions or proceedings wherein or with respect to the subject matter of which, plaintiff might directly or indirectly be concerned or have any right or interest, have uniformly been referred to him.

[fol. 27] 3. That plaintiff was not served with and never received any process in, was not a party to, and had no notice or knowledge of, any proceedings whatsoever in the Superior Court of the State of California, in and for the City and County of San Francisco, in the Matter of the Estate of Ben Black, also known as Bernard Black, deceased.

(Sworn to June 20, 1957.)

IN UNITED STATES DISTRICT COURT

OPINION—December 31, 1957

BRYAN, District Judge:

This is an action for copyright infringement by one music publisher against another. Plaintiff claims to be the owner of a partial interest in the renewal copyright of the song "Moonlight and Roses," and seeks the enforcement of its rights as such owner. Defendant alleges that it is the owner of the entire copyright, including the partial interest claimed by plaintiff, and counterclaims for enforcement of its rights.

A United States copyright is valid for twenty-eight years from the date of first publication. 17 U.S.C., § 24. During the last year of the original twenty-eight year term an application for renewal for an additional twenty-eight years may be made under 17 U.S.C., § 24 by "the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin * * *."

The question presented here is whether the assignment of his renewal rights by Ben Black, one of the co-authors of the song, to plaintiff prior to the time when they ac- [fol. 28] crued at the commencement of the last year of the original term of the copyright was defeated by the author's death before the period within which renewal could be commenced. There seem to be no reported cases which specifically pass on this question and it appears to be one of first impression.

In Fred Fisher Music Co. v. M. Witmark & Sons, 318 U. S. 643, the Supreme Court had before it for the first time the question of whether under the Copyright Act of 1909 an author may validly assign his renewal rights to a copyright prior to the time he actually acquires or may acquire them during the last year of the original copyright term. The court held that such an assignment was valid and binding as against the author or his subsequent assignees if the author sur[illegible]ves until the twenty-eighth year

of the original copyright term, the year in which his renewal rights accrued. However, since the author was still alive at the time the renewal period commenced, *Fisher* left open the question presented here of whether such an assignment by the author could defeat the statutory right to renew which is expressly given to his widow and children, executor or next of kin by 17 U.S.C., § 24 if the author dies before the commencement of the twenty-eighth year of the original term.

The facts have been stipulated, and are as follows:

"Moonlight and Roses" was written by Ben Black and Charles N. Daniels some time prior to 1925. The authors assigned the composition and the right to secure a copyright therein to Villa Moret, Inc., a music publisher, and the latter obtained a copyright on January 10, 1925. This copyright expired on January 9, 1953.

On October 3, 1946 Ben Black assigned his partial interest in the renewal copyright to the plaintiff, Miller Music Corporation. The instrument of assignment did not by express language purport to bind Black's testamentary [fol. 29] representatives. The assignment included a power of attorney under which the plaintiff was authorized to file a renewal application in Ben Black's name. On October 14, 1946 the plaintiff obtained separate assignments from David, Jules and Isidore Black, brothers of Ben Black, of any respective interests which they might have in the renewal copyright. All the assignments contained covenants by the assignors to make and execute any and all further instruments, documents and writings for the purpose of perfecting and confirming all rights and interests in the renewal copyright in the plaintiff. Each was duly recorded in the Copyright Office on October 27, 1946.

Ben Black died, a resident of California, on December 26, 1950, before the commencement of the last year of the original copyright term when the right to apply for renewal first accrued. He left no surviving widow or children. In his will he names his brother David Black, and the Bank of America, as co-executors. The Bank failed to qualify and David Black became the sole executor.

The will, which was admitted to probate in the Superior Court of the State of California on February 15, 1951,

made no mention of the renewal copyright or of the 1946 assignment to plaintiff. The residuary estate was left to the testator's nephews and nieces, the children of various of his brothers.

On January 16, 1952, during the last year of the original copyright term, David Black, as executor of the estate of Ben Black, applied to the Copyright Office for the renewal of the copyright in "Moonlight and Roses" and received a certificate of renewal registration from the Register of Copyrights.

On March 24, 1952 the California Superior Court issued a decree ordering the distribution of all the property in the estate. The decree specified that all the rights in "Moonlight and Roses" were included in the distribution to the nephews and nieces as residuary legatees. The latter [fol. 30] assigned all their right, title and interest in the composition to the defendant by written assignment dated May 1, 1952. Upon petition of David Black as executor the assignment was approved by the Superior Court of California on June 23, 1952. Subsequently, a copy of the assignment, signed by David Black as executor, as well as by the assigning nephews and nieces, was filed with the Copyright Office.

The defendant has also acquired the renewal rights of the co-author, Charles N. Daniels, through an assignment from Daniels' children. There is no question as to the ownership of the Charles N. Daniels interest. The only dispute is as to who owns the Ben Black interest.

Plaintiff, asserting its partial ownership, demands that defendant be enjoined from infringing its rights under the copyright renewal; that defendant be compelled to assign to the plaintiff all the right, title and interest of author Ben Black which it claims; and that defendant be required to pay such damages as plaintiff has sustained and to account for all gains and profits derived by such infringement. Defendant counterclaims for substantially the same relief and demands, in addition, that plaintiff be required to deliver up for destruction all infringing copies and all plates, moulds and other matter used for making such infringing copies. Both sides have moved for summary judgment on the stipulated facts. The only question presented

is one of law as to the enforceability of the respective assignments under these circumstances.

Defendant's first contention is that the decree of final distribution by the California probate court is conclusive as to the ownership of the renewal copyright. This contention may be disposed of briefly. Section 1021 of the Probate Code of California provides:

> "§ 1021. *Decree of distribution.* In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may [fol. 31] demand, sue for, and recover their respective shares from the executor or administrator, of any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees."

The California courts have consistently held that one who claims as a stranger to the estate or adversely to the estate rather than as an heir, devisee or legatee, will not be bound by a decree of distribution since the jurisdiction of the probate court is limited to rights granted in privity with the estate and does not extend to the rights or titles of adverse claimants. Estate of King, 199 Cal. 113; Estate of Cropper, 83 Cal. App. (2d) 105; Estate of Kurt, 83 Cal. App. (2d) 681.

Plaintiff's claim is based on an assignment executed during the author's lifetime. As such, the claim is one adverse to the estate under the California cases just cited. Plaintiff does not claim as an heir, devisee or legatee and the California probate decree does not constitute a binding adjudication of its rights.

Determination of rights of the parties here must rest on the effect to be given to Section 24 of the Copyright Act. The language of that section makes no reference to an assignment by an author of renewal rights which might accrue in the future. Until the Supreme Court resolved the question in Fred Fisher Music Co. v. M. Witmark & Sons, *supra*, it was far from clear that the author could, prior to the last year of the original term, make any valid assignment at all of his renewal rights. But even though

the validity of such assignments, if the author remains alive, has been established, it remains to be determined whether an assignee acquires a vested interest in the renewal rights or merely an interest contingent on the author's survival until commencement of the twenty-eighth year of the original term when his renewal rights first accrue.

[fol. 32] The statute provides that if the author is not alive during the last year of the original term, designated persons, viz., the widow and children, executor, or next of kin, in the order named, may apply for renewal in the author's stead. Defendant contends that since the designated persons, including the executor, derive their interest solely and directly from the statute, the author may not, by prior assignment, deprive any of them of the rights which the statute expressly grants them.

The rights granted by the successive Copyright Acts passed by Congress, including the presently subsisting Act of 1909, are created solely and entirely by the statute and have no existence apart from the statute. See White-Smith Music Pub. Co. v. Goff, 1 Cir., 187 Fed. 247, 248. Thus the right of renewal or extension after the expiration of the original term derives solely from the statute and does not exist independently of it. Ever since the enactment of the Act of February 3, 1831, C. 16, 4 Stat. 436, 439, there was, with respect to renewals or extensions, (White-Smith Music Pub. Co. v. Goff, *supra*, at p. 250):

> " * * * an entirely new policy, completely dissevering the title, breaking up the continuance in a proper sense of the word, whatever terms might be used, and vesting an absolutely new title eo nomine in the persons designated."

This method persists in the present act which *eo nomine* designates the persons who may apply for a renewal as the author if living at commencement of the last year of the original term, or, if he is not living his widow and children, his executor or his next of kin successively.

The courts have frequently stated that prior to the last year of the original term the author has merely an expec-

tancy in the renewal term. De Sylva v. Ballentine, 351 U. S. 570, 574; Rossiter v. Vogel, 2 Cir., 134 F. 2d 908, 910; Carmichael v. Mills Music, Inc., D.C.S.D.N.Y., 121 F. [fol. 33] Supp. 43, 45. In the light of the policy of the act with respect to renewal rights "expectancy" means that any right to renewal which the author may have is entirely contingent upon the author's survival until the commencement of the twenty-eighth year. Since this be so an author's assignment of his renewal rights *in futuro* can effectively transfer such rights to the assignee only if the author survives until the commencement of the twenty-eighth, or last, year of the original term. If the author survives he becomes vested with an absolute power to renew under the statute, and the prior contingent assignment in turn vests such renewal rights in the assignee. On the other hand, if the author fails to survive he has never become vested with any rights of renewal, such rights by statute have been vested *eo nomine* in his widow, children, executor or next of kin, as the case may be, and there is nothing which can pass by virtue of the assignment.

Plaintiff concedes that when an author fails to survive until the commencement of the last year of the original term, any prior assignment by him is void as against the widow, children and next of kin. But it contends that this is not true as to the executor, because an executor stands in the shoes of his testator and is bound to carry out any agreements entered into by the testator during his lifetime. I cannot agree with this contention. The statute does not differentiate between rights which it vests in the widow and children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those of the other persons named therein. The executor's right to renew in the event that neither the author nor his widow and children survive at the commencement of the renewal period is not a derivative right arising under general testamentary law. It is rather a right arising from the statute itself which has created the right in its own express and limited terms. Since, as has been pointed out, no such [fol. 34] right exists apart from the statute, the right can-

not be taken away unless the statute expressly so provides. This Congress has not seen fit to do.

Under the scheme of the statute the right of renewal does not follow the ordinary rules of succession. It may be noted, for example, that the widow and children are entitled to renew even though there be a will in which an executor has been designated. Moreover, while the executor may renew if there be no widow or children there is no mention whatever of an administrator should the author die intestate. In such case, absent widow and children, the renewal right is vested in the next of kin directly. This statutory scheme, in derogation of the ordinary law of succession is a further indication that the right of renewal does not belong to the author's estate by right of succession, but belongs only to the appropriate person designated in the statute, in this case the executor, who would in turn be obligated to apply for the renewal and distribute the rights so acquired in accordance with the terms of the will.

In Danks v. Gordon, 2 Cir. 272 Fed. 821, an administrator brought an action for infringement of a copyright renewal. The court held that the action was really one for unpaid royalties, and that an administrator has no standing to sue for infringement of a copyright renewal since he is not one of the persons entitled to renew under the statute. The action was dismissed for want of jurisdiction. The court stated at p. 825:

> " * * * It will be noticed that, while an executor is mentioned an administrator is not and therefore has been regarded as excluded. White-Smith Music Publishing Co., v. Goff (C. C.) 180 Fed. 256, 258. The right of renewal does not follow the author's estate but the renewal right is derived directly from the statute."

[fol. 35] In Fox Film Corp. v. Knowles, 261 U. S. 326, the author died prior to the commencement of the last year of the original copyright term, leaving no surviving widow or children, and his executor subsequently applied for the renewal copyright. The question presented there was

whether an executor could, through renewal, obtain rights which his testator never possessed during his lifetime, or whether the executor's right to apply for renewal was limited to the rare situation where the author died during the last year of the original copyright term without having made the necessary application for renewal himself. In holding that the executor's rights are the same as those of the other persons named in the statute, and that the executor's right to renew is independent of the author's rights at the time of his decease, Mr. Justice Holmes stated (261 U. S. at 329-330):

> " * * * No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had. The limitation is derived from a theory that the statute cannot have intended the executor to take unless he took what the testator already had. We should not have derived that notion from the section * * * "

In Fred Fisher Music Co. v. M. Witmark & Sons, *supra*, the Supreme Court, in holding that "an assignment of an author's renewal right was valid if the author survived until such right became vested in him, refers to the author's "*contingent* interest in the renewal" under the 1831 [fol. 36] Act prior to the commencement of the period when he could, if living, apply for renewal. (318 U. S. at p. 651.)

In the opinion of the Court of Appeals for this Circuit below in the *Fisher* case, 125 F. 2d 949; the court discussed the effect of the death of an author who had assigned his renewal interest prior to the vesting of his right to renewal and said by way of *dictum* (p. 950):

> " * * * It is also apparent that the assignment here would not have cut of the rights of renewal extended

"to the widow, children, executors, or next of kin, in the event of Graff's death prior to the renewal period. * * *."

Applying the reasoning of Mr. Justice Holmes in the *Fox Film* case and of the *dictum* of the Court of Appeals of this Circuit in *Fisher* to the facts before me, I conclude that the executor has the same rights under the statute as the widow and children or next of kin. His right to renew is completely independent of what the author's rights were at the time of his decease. The fact that the author had assigned his inchoate renewal rights to the plaintiff would not have barred his widow, or children, if any, from exercising their statutory renewal rights. See De Sylva v. Ballentine, 351 U. S. 570, 582; Silverman v. Sunrise Pictures Corp., 2 Cir., 273 Fed. 908, 913; Shapiro, Bernstein & Co. v. Bryan, 2 Cir., 123 F. 2d 697, 700. Under the *Fox Film* and *Fisher* cases it is clear that the executor's rights are no less than that of the widow and children or next of kin. They therefore cannot be defeated by the author's prior assignment.[1]

[fol. 37] If it be argued that it is incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment, the remedy lies with Congress which passed the statute, and not with the courts. For there is nothing in the language used by Congress which permits a contrary conclusion. The basic purpose of these provisions of the copyright statutes since the Act of 1831 is to give the reward to the author rather than the bookseller.

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[1] There has been some disagreement among the text writers as to the effect of an assignment by the author upon the executor's subsequent right to renew under the statute. The following writers seem to be of the view that the author assigns only his expectancy, and that his death before the twenty-eighth year of the first term renders any previous assignment of the expectancy invalid; Ball, Law of Copyright and Literary Property (1944) 555-56, Spring, Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising and The Theater (2nd ed., revised) 95; Ladas, International Protection of Literary and Artistic Property (1938) 772-73. For the contrary view, see Drone on Copyright (1879) 327; Shafter, Musical Copyright (2d ed. 1939) 177.

Register of Debates, Vol. 7, Appendix CXIX. The report of the House Committee regarding Section 23 of the Act of 1909 (now Section 24) makes it plain that this was also the purpose of that section. H. Rep. 2222, 60th Cong., 2d Sess. pp. 14-15. Indeed, with respect to the renewal rights vested in the executor by the section the Committee stated:

> "* * * Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permi the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal."

[fol. 38] The contingent interest in the renewal assigned to the plaintiff therefore never vested and was terminated by the death of the author. The renewal right then vested in the executor who could apply for and obtain a renewal which passed to the residuary legatees. They in turn could and did validly assign such rights to the defendant.

Plaintiff's motion for summary judgment is therefore denied and defendant's motion for summary judgment is granted.

However, the relief which defendant seeks by way of damages, an accounting, attorney's fees and the impounding and destruction of infringing copies, plates and moulds, will require further proceedings. The order to be entered on these motions will make provision for such further proceedings as may be necessary.

Settle order on 10 days' notice.

Dated: New York, N. Y., December 31, 1957.

Frederick V. P. Bryan, U. S. D. J.

[fol. 39]

IN UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT—Entered February 28, 1958

This cause came on to be heard on motion of the plaintiff and cross-motion of the defendant for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in the action, and upon the stipulation of facts dated March 18, 1957, in support of the motion of the plaintiff, and the cross-motion of the defendant dated May 28, 1957, and the Court having heard oral argument and having found that there was no genuine issue as to any material fact and no controversial question of fact to be submitted to the Trial Court, and having concluded that defendant is entitled to judgment as a matter of law, and that plaintiff is not entitled to judgment as a matter of law, it is hereby

Ordered, adjudged and decreed as follows:

1. That the complaint be dismissed on the merits.

2. That the defendant have judgment on its counterclaim and for the costs of this action to be taxed in accordance with the Rules of this Court and that defendant have execution therefor.

3. That plaintiff, its agents and servants, shall be and they hereby are enjoined permanently from infringing the U. S. renewal copyright of the musical composition entitled "MOONLIGHT AND ROSES (BRING MEM'RIES OF YOU)" by Ben Black and Charles N. Daniels, in any manner, and from publishing, selling, marketing or otherwise disposing of any copies of the said musical composition or any part or parts thereof in any manner or form in the United States of America, its Territories and possessions.

4. That plaintiff, its agents and servants, be and they hereby are restrained from making any claims with respect to the ownership of the U. S. renewal copyright of [fol. 40] the musical composition entitled "MOONLIGHT AND ROSES (BRING MEM'RIES OF YOU)" and are hereby ordered to withdraw all notices of claim of ownership it has made

with respect to the U. S. renewal copyright of the musical composition entitled "MOONLIGHT AND ROSES (BRING MEMORIES OF YOU)", including but not limited to notices and demands heretofore made upon the American Society of Composers, Authors and Publishers, and Harry Fox, agent and trustee.

5. That any and all monies accrued on account of the U. S. renewal copyright of the musical composition entitled "MOONLIGHT AND ROSES (BRING MEM'RIES OF YOU)" withheld by said American Society of Composers, Authors and Publishers and said Harry Fox, agent and trustee, because of the claim of defendant to ownership of an interest therein shall be paid to defendant.

6. That this order when entered shall be deemed the judgment of the Court.

7. That the enforcement of this order is hereby stayed pending the determination of the appeal herein to the Circuit Court.

8. That the posting of any and all bonds in connection with said appeal having been waived by defendant is hereby dispensed with.

Dated: New York N. Y., February 27, 1958

Frederick V. P. Bryan, U. S. D. J.

Judgment Entered: February 28, 1958

Herbert A. Charlson, Clerk.

[fol. 41]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S NOTICE OF APPEAL—Filed March 11, 1958

Notice is hereby given that Miller Music Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order and judgment, made on February 27, 1958 and entered in this action on February 28, 1958, granting the motion of the defendant for summary judgment dismissing the complaint on the merits and for judgment on its counterclaim.

Dated: New York, N. Y., March 10, 1958.

[fol. 54]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 165—October Term, 1958.

Argued March 9, 1959

Docket No. 2. 339

MILLER MUSIC CORPORATION, Plaintiff-Appellant,

—v.—

CHARLES N. DANIELS, INC., Defendant-Appellee.

Before: Washington, Waterman and Moore, Circuit Judges.

Action for copyright infringement. Appellant and appellee each moved for summary judgment below. The defendant's motion having been granted, Southern District of New York, Bryan, J., the plaintiff appeals. Affirmed.

Abeles & Bernstein (Julian T. Abeles, of counsel), New York City, for Plaintiff-Appellant.

Lewis A. Dreyer and Jack M. Ginsberg (Lewis A. Dreyer, Jack M. Ginsberg, New York City; Milton A. Rudin, Payson Wolff, Los Angeles, Calif., of counsel), for Defendant-Appellee.

[fol. 55] OPINION—April 23, 1959

Per Curiam:

The judgment below is affirmed upon the written opinion of Judge Bryan, reported at 158 F. Supp. 188.

WASHINGTON, Circuit Judge (dissenting):

In his opinion below, Judge Bryan recognizes that it may be "incongruous to allow an author who has no widow

or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment * * *" 158 F. Supp. 188, 194 (S. D. N. Y. 1957). In my view, such a result is not only incongruous but without legal justification. In the present case, the will did not purport to bequeath the renewal rights. It was silent as to them. For all we know, the testator may have assumed that his prior assignment would be honored by his executor. But the reasoning of the opinion below extends to a silent will as well as to one in outright derogation of a previous assignment. I think in both cases the assignment should prevail.

Under the present Act, the original term for copyright protection is twenty-eight years, with a further term of twenty-eight years upon renewal. 17 U. S. C. §24 (1952).[1] According to the scheme of the statute, should the author die prior to the time when the renewal rights vest in him, any assignment of those rights which he had theretofore [fol. 56] made could not defeat the statutory right of the author's widow (or widower) and children to the copyright renewal. Cf. *De Sylva* v. *Ballentine*, 351 U. S. 570, 580 (1956). Similarly, if no widow and children survive, and the author were to leave no will, the renewal rights would vest in the next of kin. Cf. *Silverman* v. *Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), cert. denied, 262 U. S. 758 (1923). Finally, if no widow and children survive, the author nevertheless has the power to "bequeath by will the right to apply for the renewal." H. R. Rep. No. 2222, 60th Cong., 2d Sess. 15 (1909). Under such circumstances the executor is given the power to obtain the renewal. See *Fox Film Corp.* v. *Knowles*, 261 U. S. 326 (1923).

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[1] The pertinent language is:

"* * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright. * * *"

This statutory scheme was created by Congress to protect the author and his family from the author's own improvidence. *Shapiro, Bernstein & Co.* v. *Bryan*, 123 F. 2d 697, 700 (2d Cir. 1941). But even though the intent of Congress was that the renewal rights in the first instance be "exclusive" in the author, and even though the statute was therefore framed so that the author "could not be deprived of that right," H. R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909), there was certainly no intent by the Congress to set up an absolute prohibition on the power to assign the renewal rights. The author not only can assign the original copyright, see 17 U. S. C. §28 (1952), but also the renewal copyright as well, once the renewal right has vested in him, see *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 645 (1943). Similarly, " 'an agreement to assign his renewal, made by an author in advance of the twenty-eighth year of the original term of copyright, is valid and enforceable.' " *Id.* at 647. Of course, it has been assumed that this broad power of assignment cannot be construed to defeat the renewal rights which vest in the widow and children or next of kin when the author [fol. 57] dies prior to the twenty-eighth year of the original copyright. See, e.g., *De Sylva* v. *Ballentine, supra* at 582. But even these renewal rights may be effectively defeated in favor of an assignee if the widow, children, and next of kin all join in the prior assignment by the author. Cf. *Tobani* v. *Carl Fischer, Inc.*, 263 App. Div. 503, 33 N. Y. S. 2d 294, affirmed, 289 N. Y. 727, 46 N. E. 2d 347 (1942). There can thus be no doubt that Section 24 of the Copyright Act does not create any "drastic restriction on free assignability." *M. Witmark & Sons* v. *Fred Fisher Music Co.*, 125 F. 2d 949, 953 (2d Cir. 1942), affirmed, 318 U. S. 642 (1943). This is especially true in light of the whole "history of judicial disapproval of restraints on assignability." 125 F. 2d at 953.

As we have noted, the statute includes the "author's executors" in the class of persons entitled to apply for renewal and extension of a copyright. But this cannot mean that Congress intended the executor to take personally and beneficially, as in the case of a widow or child. "The executor represents the person of his testator * * * " *Fox*

Film Corp. v. *Knowles*, 261 U. S. at 330. Therefore, he clearly is to take only in a representative and official capacity in order to prevent the copyright from lapsing and to effectuate any bequest of the renewal right which the testator was entitled to make. See *id.* at 329. For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath those rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs. In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—[fol. 58] a contract which was clearly "valid and enforceable" under the *Fisher* case.

In contrast, the opinion below, adopted by the majority of this court, permits an injustice to be perpetrated. It also reinforces an anomaly within the present statutory scheme. Because an executor cannot take office until the author dies, he is the only interested person who cannot join in a prior assignment of renewal rights by the author, and hence—under the reasoning of the opinion below—the only person who can absolutely defeat the rights of the prior assignee. Such is the result in the present case. But it seems highly incongruous and illogical to place the executor, and the people who take under the will, in a position preferred to that of the author's widow and children. Surely this could never have been the result Congress intended. See *De Sylva* v. *Ballentine*, *supra* at 582; *Shapiro, Bernstein & Co.* v. *Bryan*, *supra* at 700.

[fol. 59]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. George T. Washington, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Circuit Judges.

MILLER MUSIC CORPORATION, Plaintiff-Appellant,

v.

CHARLES N. DANIELS, INC., Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

JUDGMENT—April 23, 1959

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 60] [File endorsement omitted]

[fol. 61] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 214—October Term, 1959.

MILLER MUSIC CORPORATION, Petitioner,

vs.

CHARLES N. DANIELS, INC.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 214

MILLER MUSIC CORPORATION,

Petitioner,

against

CHARLES N. DANIELS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD H. CORBIN,
Attorney for Petitioner.

JULIAN T. ABELES,
Of Counsel.

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IN THE

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OCTOBER TERM 1959

No:

MILLER MUSIC CORPORATION,

Petitioner,

against

CHARLES N. DANIELS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the within action, dated and entered April 23, 1959, affirming the final judgment of the United States District Court for the Southern District of New York, entered on February 28, 1959, upon the defendant's motion for summary judgment dismissing the complaint upon the merits.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Appendix I, *infra*, pp. 21-32) is reported in 158 F. Supp. 188. The judgment of the District Court was affirmed by the Court of Appeals upon the opinion below (Appendix I, *infra*, p. 34), with a dissenting opinion by Washington, Cir. J. (Appendix I, *infra*, pp. 34-37) which is reported in 265 F. 2d 925.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed (Appendix II, *infra*, p. 38) is dated and was entered on April 23, 1959. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254 (1).

Questions Presented for Review

Whether under § 24 (former § 23) of the Copyright Act of 1909:

(1) The determination of the Court of Appeals that as the statute "does not differentiate between rights which it vests in the widow and children, the executor and the next of kin," (a) the executor takes such renewal rights for himself and beneficially and not in the right of others in trust for administration on their behalf, and (b) such renewal rights of the executor "cannot be defeated by the author's prior assignment," has any legal justification.

(2) An author's executor, who had applied for and obtained the renewal in a copyrighted work of the author who, having no wife or children, had made an assignment of his renewal interest in the copyrighted work to a publisher for a valuable consideration in which assignment his

sole next of kin joined, and had then made a will which did not purport to bequeath such renewal interest and under which his residuary estate was bequeathed to certain individuals, and had died before the accrual of the right of renewal leaving no widow or children, could, in derogation of such prior assignment to the said publisher, effectuate a subsequent assignment of the renewal from the residuary legatees to another publisher.

Statute Involved

The only statutory provision involved is § 24 (former § 23) of the Copyright Act of 1909, Act of March 4, 1909, c. 320, 35 Stat. 1075, et seq., U.S.C. Title 17 (Appendix III, *infra*, pp. 39, 40).

Statement of the Case

The basis for federal jurisdiction in the District Court is the Act of June 25, 1948, c. 646, 62 Stat. 931, U.S.C. Title 28, § 1338 (a), reading as follows:

> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

The cause of action of plaintiff, a music publisher, is for the infringement by defendant, a music publisher, of the rights, title and interest of plaintiff through one Ben Black, as co-author, in the renewal copyright of a musical composition entitled "Moonlight and Roses (Bring Mem'ries Of You)" R. 2a-6a)*.

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*Record references are to pages of the Plaintiff-Appellant's Appendix below. Defendant-Appellee's Appendix contains only the opinion of the District Court, which is likewise contained in the Plaintiff-Appellant's Appendix.

Both parties moved for summary judgment (R. 25a, 26a). The District Court denied plaintiff's motion and granted defendant's motion, dismissing the complaint on the merits and for judgment on its counterclaim enjoining plaintiff from infringing defendant's alleged rights, title and interest through said Ben Black in said renewal copyright, and restraining plaintiff from making any claims with respect to the ownership of said renewal copyright (R. 39a, 40a).

The respective motions for summary judgment were based upon an agreed statement of facts and conclusions of law. Following are the material facts so stipulated (the preceding numbers indicating the respective paragraphs of the stipulation, R. 7a-25a, and "Ex." indicating the particular exhibit annexed thereto):

3—Prior to January 10, 1925, said Ben Black (referred to as "Decedent") and one Charles Neil Daniels wrote the said musical composition (referred to as "Said Composition") (R. 7a).

5—Prior to January 10, 1925, they assigned to Villa Moret, Inc., a music publisher, Said Composition and the right to secure copyright therein in its name (R. 8a).

6—In 1925, the said assignee secured United States copyright in Said Composition for the original term of 28 years (R. 8a).

8—Under date of October 3, 1946, Decedent entered into a written agreement with plaintiff (Ex. A, R. 13a-16a), under which Decedent transferred, assigned and set over to plaintiff all rights and interests whatsoever as co-author, "now or at any time or times hereafter known or in existence", in and to the renewal and extension of the United States copyright in Said Composition and other compositions, and in consideration of which plaintiff agreed

to pay certain royalties and the sum of $1,000.00 on account and in advance thereof. Decedent covenanted, undertook and agreed to make, execute and deliver any and all further instruments, documents and writings "for the purpose of perfecting and confirming" such rights and interests in plaintiff (R. 8a).

9—The said sum of $1,000.00 was paid by plaintiff to Decedent upon the signing of the said agreement (R. 9a).

10—Under date of October 14, 1946, pursuant to the said agreement, Decedent executed a separate short form instrument for recording in the Copyright Office (Ex. A-1, R. 17a), whereby "for and on behalf of himself and all other parties in interest" he transferred, assigned and set over to plaintiff "all rights and interests whatsoever, then or thereafter in existence", in the renewal and extension of the United States copyright in Said Composition. Decedent had no wife or child, and his sole next of kin were three brothers. Accordingly, for the express purpose of assuring plaintiff that, in the event of his death prior to the accrual of the renewal right without making a will, plaintiff would be certain of acquiring the renewal through his surviving next of kin, Decedent procured and delivered to plaintiff a like separate instrument of assignment from each of his three brothers to plaintiff of his renewal expectancy. Each of said assignors covenanted, undertook and agreed to make, execute and deliver any and all further instruments, documents and writings "for the purpose of perfecting and confirming" such rights and interest in plaintiff (R. 9a, Exs. A-2, A-3, A-4, R. 17a-21a).

11—The four separate instruments of assignment (referred to in paragraph 10, *supra*) were duly recorded in the Copyright Office (R. 9a).

12—Under date of June 1, 1950, Decedent executed a will in which he made provision for the discharge of the

"proper claims and charges against my estate". There was no specific bequest of the said renewal copyright in Said Composition. The residuary estate was left to certain nephews and nieces of Decedent's brothers. The will recites "I hereby declare that I am single and that I leave no issue surviving me" (App. 9a, Ex. B, R. 21a-23a).

13—On December 26, 1950, Decedent died in the State of California, leaving no widow or child. On February 13, 1951, his will was admitted to probate in the Superior Court of the State of California (R. 9a).

14—David Black, one of the brothers of Decedent, who had executed a separate assignment to plaintiff, qualified as the sole executor of the will (R. 9a, 10a).

15—On January 16, 1952, said David Black, as executor, renewed the copyright in Said Composition for the further term of 28 years from January 10, 1953 (R. 10a).

16—On March 24, 1952, final distribution of the property of the estate was decreed by the court (R. 10a).

19—Under date of May 1, 1952, defendant entered into an agreement with the aforesaid nephews and nieces of Decedent, the residuary legatees under Decedent's will, whereby they assigned to defendant "all their right, title and interest" in said renewal (R. 10a, 11a, Ex. E., R. 24a). Upon the petition of David Black, as executor, said agreement was approved by the Superior Court (R. 11a).

20—Defendant entered into an agreement for the acquisition of the interest through the co-writer, Charles Neil Daniels, in the renewal copyright in Said Composition, which interest is not at issue in this action (R. 11a).

The determination of the District Court (Opinion Appendix I, *infra*, adopted by the majority of the Court of

Appeals) is based upon the erroneous legal premise that the renewal rights which the statute "vests" in the executors are no different than those vested in the widow, children and next of kin. That is to say, they take for themselves personally and beneficially, and not in the right of others in trust for administration on their behalf. In this respect the District Court, in upholding the contention of defendant that since all the designated persons (widow, children, executors, and next of kin) "derive their interest solely and directly from the statute, the author may not, by prior assignment, deprive any of them of the rights which the statute expressly grants them", said (Appendix I, *infra*, pp. 28, 31):

> "The statute does not differentiate between rights which it vests in the widow and children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those of the other persons named therein . . . I conclude that the executor has the same rights under the statute as the widow and children or next of kin. . . . it is clear that the executor's rights are no less than that of the widow and children or next of kin. They therefore cannot be defeated by the author's prior assignment."

Reasons For Granting the Writ

A.

The Decision Has Decided A Federal Question In A Way In Conflict With Applicable Decisions Of This Court.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 63 Sup. Ct. 730, this Court stated that the sole question for determination by it was as follows (pp.

643-645, 647):

"The question itself can be stated very simply. Under § 23 of the Copyright Act of 1909, 35 Stat. 1075, as amended, a copyright in a musical composition lasts for twenty-eight years from the date of its first publication, and the author can renew the copyright, if he is still living, for a further term of twenty-eight years by filing an application for renewal within a year before the expiration of the first twenty-eight year period. Section 42 of the Act provides that a copyright 'may be assigned . . . by an instrument in writing signed by the proprietor of the copyright . . .'. Concededly, the author can assign the original copyright and, after he has secured it, the renewal copyright as well. The question is—does the Act prevent the author from assigning his interest in the renewal copyright before he has secured it?

* * * * *

"The petition for certiorari in this Court stated that the 'sole question is whether . . . an agreement to assign his renewal, made by an author in advance of the twenty-eighth year of the original term of copyright, is valid and enforceable.' Because of the obvious importance of this question of the proper construction of the Copyright Act, we brought the case here. 317 U. S. 611.

Plainly, there is only one question before us—does the Copyright Act nullify an agreement by an author, made during the original copyright term, to assign his renewal?"

With respect to the wording of the Act, this Court said (p. 647):

"No limitations are placed upon the assignability of his interest in the renewal. If we look only to what the Act says, there can be no doubt as to the

answer. But each of the parties finds support for its conclusion in the historical background of copyright legislation, and to that we must turn to discover whether Congress meant more than it said."

Then, upon examining the historical background, this Court in noting that under the Act of May 31, 1790 (1 Stat. 124), enacted by the first Congress, renewal rights were given to the author or authors, "his or their executors, administrators or assigns", said (p. 650):

> "In view of the language and history of this provision, there can be no doubt that if the present case had arisen under the Act of 1790, there would be no statutory resriction upon the assignability of the author's renewal interest. The petitioners contend, however, that such a limitation was introduced by subsequent legislation, particularly the Copyright Acts of 1831 and 1909."

This Court further noted that, under the Act of February 3, 1831 (4 Stat. 436), the renewal rights were only given to the author, and "the author's widow or children." Yet this Court said (pp. 650, 651):

> "But neither expressly nor impliedly did the Act of 1831 impose any restraints upon the right of the author himself to assign his contingent interest in the renewal."

Then coming to the present Act of March 4, 1909 (35 Stat. 1075), this Court concluded that the basic consideration of policy underlying the present Act was to give the author the right to dispose of his renewal interest separate and apart from the original copyright saying (pp. 653-654):

> "By providing for two copyright terms, each of relatively short duration, Congress enabled the author to sell his 'copyright' without losing his renewal

interest. If the author's copyright extended over a single, longer term, his sale of the 'copyright' would terminate his entire interest. That this is the basic consideration of policy underlying the renewal provision of the Copyright Act of 1909 clearly appears from the report of the House committee which submitted the legislation (the Senate committee adopted the report of the House committee, see Sen. Rep. 1108, 60th Cong., 2d Sess.)."

This Court determined that neither the langauge nor the history of the present Act evidences any intention of Congress to restrict the author, in the absence of a widow and children, from assigning his renewal interest, saying (pp. 655-657):

"If Congress, speaking through its responsible members, had any intention of altering what theretofore had not been questioned, namely, that there were no statutory restraints upon the assignment by authors of their renewal rights, it is almost certain that such purpose would have been manifested. The legislative materials reveal no such intention.

We agree with the court below, therefore, that neither the langauge nor the history of the Copyright Act of 1909 lend support to the conclusion that the 'existing law' prior to 1909, under which authors were free to assign their renewal interests if they were so disposed, was intended to be altered. We agree, also, that there are no compelling considerations of policy which could justify reading into the Act a construction so at variance with its history.

* * *

We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests."

The theory of the Court below that, as an executor derives his interest solely and directly from the statute and that as the statute "vests" the same rights in him as in the other named persons, the executor takes personally and beneficially rather than in a representative capacity, has been refuted by this Court.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra,* this Court, in noting that the report of the House Committee (H. Rep. 2222, 60th Cong., 2d Sess., pp. 14-15) adopted by the Senate Committee (Sen. Rep. 1108, 60th Cong. 2d Sess.) specifically expressed the intention of § 24 (former § 23) "to permit the author who had no wife or children to bequeath by will the right to apply for the renewal", said (p. 655):

> "The report cannot be tortured, by reading it without regard to the circumstances in which it was written, into an expression of a legislative purpose to nullify agreements by authors to assign their renewal interests."

Accordingly, the executor's right of renewal is not derived solely and directly from the statute, independent of any right of his testator, personally and beneficially as in the case of a widow or child. On the contrary, in representing the person of his testator he takes only in a representative capacity, to effectuate the disposition of his testator's renewal interest whether by assignment or bequest.

In *De Sylva* v. *Ballentine,* 351 U. S. 570, 574, 76 Sup. Ct. 974, this Court said that, in the absence of a widow, widower or children, an author can effectuate a binding assignment of his renewal expectancy through his executor:

> "It is clear, however, that the executors do not succeed to the renewal interest unless *all* of the named persons are dead, since from the preceding clause it is at least made explicit that the 'widow, widower, or

children of the author' all come before the executors, after the author's death.

* * *

"This Court has already traced the development of the renewal term in the several copyright statutes enacted in this country. See *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U. S. 643, where it was held that the author, during his lifetime, could make a binding assignment of the expectancy in his future rights of renewal."

In *Fox Film Corporation* v. *Knowles,* 261 U. S. 326, 43 Sup. Ct. 365, the precise issue was for determination. This Court reversed the decree in 279 Fed. 1018 (Cir. 2), which decree had affirmed the decrees of the District Court in two cases, 274 Fed. 731 (E.D.N.Y.) and 275 Fed. 582 (S.D.N.Y.).

In each of the cases between the same parties and involving the same questions of fact and law, the defendant's motion to dismiss the complaint had been granted. The decedent, Will Carleton, had died in 1912. As in the instant case, this was prior to the renewal period, no widow or child survived him, he left a will, and the executor had applied for the renewal during the subsequent renewal period.

The District Court, in 274 Fed. 731, had dismissed the complaint upon the ground (pp. 733, 734):

"It is apparent that in 1915 the decedent, Will Carleton, had no power to make any disposition with respect to the copyright then in existence. * * * He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived."

The determination of the District Court, in 275 Fed. 582, was to the same effect.

In 279 Fed. 1018, the Court of Appeals, Second Circuit, affirmed the decrees of both District Courts, on the authority of its prior determination in *Silverman* v. *Sunrise Pictures Corporation,* 273 Fed. 909, cer. den. 262 U. S. 758, 43 Sup. Ct. 705. In that case the Court, while recognizing that there was no distinction under the statute between an assignment or devise by the author of his renewal interest, held that as the author had died before the statutory year neither his assignment nor devise of such interest could be effective, saying (p. 913):

> "But what may be assigned can ordinarily be devised, and it results that before the statutory year the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly the testatrix had as yet nothing to leave. If, however, the author lives to within the statutory year, he may certainly exercise his right to assign it, or bequeath it; and if he dies in the year, but before the registration, it is for his executors to function."

This Court in *Fox Film Corporation* v. *Knowles, supra,* in reversing the decree of the Court of Appeals, expressly held that if there is no widow or child the executor represents "the person of his testator," in acquiring and administrating the renewal rights, saying (pp. 329, 330):

> "The limitation is derived from a theory that the statute cannot have intended the executor to take unless he took what the testator already had. We should not have derived that notion from the section, which seems to us to have the broad intent that we have expressed, and the words specially applicable seem to us plainly to import that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive. The executor represents the person of his testator, Littleton,

§ 237, and it is no novelty for him to be given rights that the testator could not have exercised while he lived."

In *Brewster* v. *Gage*, 280 U .S. 327, 334, 50 Sup. Ct. 115, this Court said to the same effect:

> "Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue."

In *Silverman* v. *Sunrise Pictures Corporation, supra* (273 Fed. 909), the Court of Appeals, Second Circuit, recognized as aforesaid that there was no distinction under the statute between an assignment and a devise by an author of his renewal interest.

In *Gibram* v. *Alfred A. Knopf, Incorporated*, 153 F. Supp. 854, 859, 860 (D. C., N. Y.), affd. 255 F. 2d 121 (Cir. 2), cer. den. 358 U. S. 829, 49 Sup. Ct. 47, the District Court said:

> "Who is entitled to the benefits of the renewed copyright—the sister as the sole surviving next of kin of the Town of Bechari, Lebanon, under the will? Here the contention is that under the statute the sole right given to an author who is not survived by a spouse or children is a testamentary privilege simply to name an executor to apply for renewal. It is urged that once the renewal is obtained by a designated executor he holds the copyright in trust solely for the next of kin of the decedent and not for the benefit of any designated beneficiary or as part of the general estate.
>
> • • • • •

> The contended for construction would deprive an author, if he died without surviving spouse or children, of the right to dispose of renewal copyrights, contrary to congressional intent."

The Court of Appeals, Second Circuit, in affirming, said (p. 123):

> "Judge Weinfeld was plainly right in holding that the plaintiffs had the power and indeed the duty to renew the copyrights and to hold them for the benefit of the testator's 'home town'."

Accordingly, in *Silverman* v. *Sunrise Pictures Corporation, supra,* the same Court of Appeals recognized that there was no distinction under the statute between an assignment and a devise, and in *Gibram* v. *Alfred A. Knopf, Incorporated, supra,* it held that the executor renewed the copyrights for "the benefit of" the devisee under the testator's will. Yet in the instant case the same Court held that the author's assignment was ineffective under the statute, because the executor acquired the renewal personally and beneficially rather than in a representative capacity for the benefit of the author's assignee.

As Judge Washington said in his dissenting opinion in the instant case (Appendix I, p. 36):

> "As we have noted, the statute includes the 'author's executors' in the class of persons entitled to apply for renewal and extension of a copyright. But this cannot mean that Congress intended the executor to take personally and beneficially, as in the case of a widow and child. 'The executor represents the person of his testator * * *' Fox Film Corp. v. Knowles, 261 U. S. at 330. Therefore, he clearly is to take only in a representative and official capacity in order to prevent the copyright from lapsing and to effectuate any bequest of the renewal right which the testator was

entitled to make. See id. at 329. For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath those rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs. In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—a contract which was clearly 'valid and enforceable' under the Fisher case.

In contrast, the opinion below, adopted by the majority of this court permits an injustice to be perpetrated. It also reinforces an anomaly within the present statutory scheme. Because an executor cannot take office until the author dies, he is the only interested person who cannot join in a prior assignment of renewal rights by the author, and hence—under the reasoning of the opinion below—the only person who can absolutely defeat the rights of the prior assignee. Such is the result in the present case. But it seems highly incongruous and illogical to place the executor, and the people who take under the will, in a position preferred to that of the author's widow and children. Surely this could never have been the result Congress intended. See De Sylva v. Ballantine, supra, at 582; Shapiro, Bernstein & Co. v. Bryan, supra at 700."

The only limitation under Section 24, upon the author's power to dispose of his renewal interests, is for the protection of his widow and children, if any, in the form of a compulsory bequest to them.

As the Court of Appeals, Second Circuit, said in *Shapiro, Bernstein & Co. Inc.* v. *Bryan*, 123 F. 2d 697, 700, referring to the pertinent proviso of Section 24, "The limitation which the second proviso imposes upon the author's power to dispose of the right of renewal during his life" was

"clearly intended to protect widows and children from the supposed improvidence of authors in the colloquial sense."

In *De Sylva* v. *Ballentine, supra* (p. 582), this Court said to the same effect:

> "The evident purpose of § 24 is to provide for the family of the author after his death. Since the author cannot assign his family's renewal rights, § 24 takes the form of a compulsory bequest of the copyright to the designated persons."

If the author had not executed a will, having died leaving no widow or children, the plaintiff would have acquired the renewal under the assignment from the author's sole next of kin.

Having left a will the author, who had no wife or children, thereby bequeathed by will the right of the executor to apply for the renewal and effectuate the author's assignment to plaintiff. (*Fred Fisher Music Co.* v. *M. Witmark & Sons, supra,* p. 655). The author having made no specific bequest of the renewal rights, must he not have assumed that his executor would honor his assignment, as he would any other obligation of the testator? As Judge Washington said in his dissenting opinion (Appendix I, *infra,* p. 34):

> "In the present case, the will did not purport to bequeath the renewal rights. It was silent as to them. For all we know, the testator may have assumed that his prior assignment would be honored by his executor. But the reasoning of the opinion below extends to a silent will as well as to one in outright derogation of a previous assignment. I think in both cases the assignment should prevail."

B.

The Decision Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The District Court said "there seems to be no reported cases which specifically pass on the question and it appears to be one of first impression" (Appendix I, *infra*, p. 22).

Judge Washington, in his dissenting opinion said (Appendix I, *infra*, p. 34):

> "In his opinion below, Judge Bryan recognizes that it may be 'incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment * * *' 158 F. Supp. 188, 194 (S.D.N.Y., 1957). In my view, such a result is not only incongruous but without legal justification."

Under the construction of the Court below an author having no wife or child could assign his renewal expectancy to one publisher for a consideration and then, through the devise of a will, effectuate a second assignment either by a direct bequest, or, as in the instant case through residuary legatees, to another publisher. In the light of this construction no publisher would contract with an author for his renewal expectancy.

As this Court said in *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra* (p. 657):

> "If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell."

As Judge Washington pointed out, *supra*, the Court below, while recognizing that it may be "incongruous to

allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment," nevertheless has accepted a construction that produces just such an incongruous result.

This Court said in *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282, 288, 77 Sup. Ct. 330, referring to its prior determination in *Mastro Plastics Corp.* v. *Labor Relations Board*, 350 U. S. 270, 286, 76 Sup. Ct. 349:

> "Moreover, in Mastro Plastics we cautioned against accepting a construction that 'would produce incongruous results.' Id. at 286."

The author of this petition, Julian T. Abeles, is general counsel for the Music Publishers' Protective Association, Inc., the membership of which comprises most of the leading music publishers in the United States, and is attorney for members of said association. He is likewise general counsel for one Harry Fox, as the agent and trustee for over 600 music publishers, in the licensing of rights to their copyrighted musical works. By reason of his representation of such interests, he knows of his own knowledge that assignments of renewal interests by authors, in the same category as the assignment in the instant case and representing a substantial number of all renewal assignments, have been entered into in good faith by the authors and music publishers upon the assumption that they were valid and enforceable.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra* (pp. 658, 659), this Court in noting that there had been "no significant change" in the number of "assignments of renewals" recorded in the Copyright Office since the 1909 enactment of the present Act, said:

> "Many assignments have thus been entered into in good faith upon the assumption that they were valid and enforceable.
>
> * * * * *

"The available evidence indicates, therefore, that renewal interests of authors have been regarded as assignable both before and after the Copyright Act of 1909."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, July 15, 1959.

HAROLD H. CORBIN,
Attorney for Petitioner.

JULIAN T. ABELES,
Of Counsel.

APPENDIX I.

Opinion of the United States District Court, Southern District of New York, Upon Which the Judgment Was Affirmed by the United States Court of Appeals, Second Circuit.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MILLER MUSIC CORPORATION,

Plaintiff,

against

CHARLES N. DANIELS, INC.,

Defendant.

APPEARANCES:

ABELES & BERNSTEIN, ESQS.
Attorneys for Plaintiff
JULIAN T. ABELES, ESQ.
ARNOLD J. BERNSTEIN, ESQ.
Of Counsel

LEWIS A. DREYER, ESQ., and
JACK M. GINSBERG, ESQ.
Attorneys for Defendant
MILTON A. RUDIN, ESQ.
Of Counsel

OPINION

BRYAN, District Judge:

This is an action for copyright infringement by one music publisher against another. Plaintiff claims to be

the owner of a partial interest in the renewal copyright of the song "Moonlight and Roses," and seeks the enforcement of its rights as such owner. Defendant alleges that it is the owner of the entire copyright, including the partial interest claimed by plaintiff, and counterclaims for enforcement of its rights.

A United States copyright is valid for twenty-eight years from the date of first publication. 17 U.S.C. § 24. During the last year of the original twenty-eight year term an application for renewal for an additional twenty-eight years may be made under 17 U.S.C. § 24 by "the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin • • •."

The question presented here is whether the assignment of his renewal rights by Ben Black, one of the co-authors of the song, to plaintiff prior to the time when they accrued at the commencement of the last year of the original term of the copyright was defeated by the author's death before the period within which renewal could be commenced. There seem to be no reported cases which specifically pass on this question and it appears to be one of first impression.

In Fred Fisher Music Co. v. M. Witmark & Sons, 318 U. S. 643, the Supreme Court had before it for the first time the question of whether under the Copyright Act of 1909 an author may validly assign his renewal rights to a copyright prior to the time he actually acquires or may acquire them during the last year of the original copyright term. The court held that such an assignment was valid and binding as against the author or his subsequent assignees if the author survives until the twenty-eighth year of the original copyright term, the year in which his

renewal rights accrued. However, since the author was still alive at the time the renewal period commenced, *Fisher* left open the question presented here of whether such an assignment by the author could defeat the statutory right to renew which is expressly given to his widow and children, executor or next of kin by 17 U.S.C. § 24 if the author dies before the commencement of the twenty-eighth year of the original term.

The facts have been stipulated, and are as follows:

"Moonlight and Roses" was written by Ben Black and Charles N. Daniels some time prior to 1925. The authors assigned the composition and the right to secure a copyright therein to Villa Moret, Inc., a music publisher, and the latter obtained a copyright on January 10, 1925. This copyright expired on January 9, 1953.

On October 3, 1946 Ben Black assigned his partial interest in the renewal copyright to the plaintiff, Miller Music Corporation. The instrument of assignment did not by express language purport to bind Black's testamentary representatives. The assignment included a power of attorney under which the plaintiff was authorized to file a renewal application in Ben Black's name. On October 14, 1946 the plaintiff obtained separate assignments from David, Jules and Isidore Black, brothers of Ben Black, of any respective interests which they might have in the renewal copyright. All the assignments contained covenants by the assignors to make and execute any and all further instruments, documents and writings for the purpose of perfecting and confirming all rights and interests in the renewal copyright in the plaintiff. Each was duly recorded in the Copyright Office on October 27, 1946.

Ben Black died, a resident of California, on December 26, 1950, before the commencement of the last year of the original copyright term when the right to apply for renewal first accrued. He left no surviving widow or chil-

dren. In his will he names his brother David Black, and the Bank of America, as co-executors. The Bank failed to qualify and David Black became the sole executor.

The will, which was admitted to probate in the Superior Court of the State of California on February 15, 1951, made no mention of the renewal copyright or of the 1946 assignment to plaintiff. The residuary estate was left to the testator's nephews and nieces, the children of various of his brothers.

On January 16, 1952, during the last year of the original copyright term, David Black, as executor of the estate of Ben Black, applied to the Copyright Office for the renewal of the copyright in "Moonlight and Roses" and received a certificate of renewal registration from the Register of Copyrights.

On March 24, 1952 the California Superior Court issued a decree ordering the distribution of all the property in the estate. The decree specified that all the rights in "Moonlight and Roses" were included in the distribution to the nephews and nieces as residuary legatees. The latter assigned all their right, title and interest in the composition to the defendant by written assignment dated May 1, 1952. Upon petition of David Black as executor the assignment was approved by the Superior Court of California on June 23, 1952. Subsequently, a copy of the assignment, signed by David Black as executor, as well as by the assigning nephews and nieces, was filed with the Copyright Office.

The defendant has also acquired the renewal rights of the co-author, Charles N. Daniels, through an assignment from Daniels' children. There is no question as to the ownership of the Charles N. Daniels interest. The only dispute is as to who owns the Ben Black interest.

Plaintiff, asserting its partial ownership, demands that defendant be enjoined from infringing its rights under the

copyright renewal; that defendant be compelled to assign to the plaintiff all the right, title and interest of author Ben Black which it claims; and that defendant be required to pay such damages as plaintiff has sustained and to account for all gains and profits derived by such infringement. Defendant counterclaims for substantially the same relief and demands, in addition, that plaintiff be required to deliver up for destruction all infringing copies and all plates, moulds and other matter used for making such infringing copies. Both sides have moved for summary judgment on the stipulated facts. The only question presented is one of law as to the enforceability of the respective assignments under these circumstances.

Defendant's first contention is that the decree of final distribution by the California probate court is conclusive as to the ownership of the renewal copyright. This contention may be disposed of briefly. Section 1021 of the Probate Code of California provides:

> "§ 1021. *Decree of distribution.* In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, of any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees."

The California courts have consistently held that one who claims as a stranger to the estate or adversely to the estate rather than as an heir, devisee or legatee, will not be bound by a decree of distribution since the jurisdiction of the probate court is limited to rights granted in privity with the estate and does not extend to the rights or titles of adverse claimants. Estate of King, 199 Cal. 113; Estate of Cropper, 83 Cal. App. (2d) 105; Estate of Kurt, 83 Cal. App. (2d) 681.

Plaintiff's claim is based on an assignment executed during the author's lifetime. As such, the claim is one adverse to the estate under the California cases just cited. Plaintiff does not claim as an heir, devisee or legatee and the California probate decree does not constitute a binding adjudication of its rights.

Determination of rights of the parties here must rest on the effect to be given to Section 24 of the Copyright Act. The language of that section makes no reference to an assignment by an author of renewal rights which might accrue in the future. Until the Supreme Court resolved the question in Fred Fisher Music Co. v. M. Witmark & Sons, *supra,* it was far from clear that the author could, prior to the last year of the original term, make any valid assignment at all of his renewal rights. But even though the validity of such assignments, if the author remains alive, has been established, it remains to be determined whether an assignee acquires a vested interest in the renewal rights or merely an interest contingent on the author's survival until commencement of the twenty-eighth year of the original term when his renewal rights first accrue.

The statute provides that if the author is not alive during the last year of the original term, designated persons, viz., the widow and children, executor, or next of kin, in the order named, may apply for renewal in the author's stead. Defendant contends that since the designated persons, including the executor, derive their interest solely and directly from the statute, the author may not, by prior assignment, deprive any of them of the rights which the statute expressly grants them.

The rights granted by the successive Copyright Acts passed by Congress, including the presently subsisting Act of 1909, are created solely and entirely by the statute and have no existence apart from the statute. See White-Smith Music Pub. Co. v. Goff, 1 Cir., 187 Fed. 247, 248.

Thus the right of renewal or extension after the expiration of the original term derives solely from the statute and does not exist independently of it. Ever since the enactment of the Act of February 3, 1831, C. 16, 4 Stat. 436, 439, there was, with respect to renewals or extensions (White-Smith Music Pub. Co. v. Goff, *supra*, at p. 250):

> "* * * an entirely new policy, completely dissevering the title, breaking up the continuance in a proper sense of the word, whatever terms might be used, and vesting an absolutely new title eo nomine in the persons designated."

This method persists in the present act which *eo nomine* designates the persons who may apply for a renewal as the author if living at commencement of the last year of the original term, or, if he is not living his widow and children, his executor or his next of kin successively.

The courts have frequently stated that prior to the last year of the original term the author has merely an expectancy in the renewal term. De Sylva v. Ballentine, 351 U. S. 570, 574; Rossiter v. Vogel, 2 Cir., 134 F. 2d 908, 910; Carmichael v. Mills Music, Inc., D.C.S.D.N.Y., 121 F. Supp. 43, 45. In the light of the policy of the act with respect to renewal rights "expectancy" means that any right to renewal which the author may have is entirely contingent upon the author's survival until the commencement of the twenty-eighth year Since this be so an author's assignment of his renewal rights *in futuro* can effectively transfer such rights to the assignee only if the author survives until the commencement of the twenty-eighth, or last, year of the original term. If the author survives he becomes vested with an absolute power to renew under the statute, and the prior contingent assignment in turn vests such renewal rights in the assignee. On the other hand, if the author fails to survive he has never become vested with

any rights of renewal, such rights by statute have been vested *eo nomine* in his widow, children, executor or next of kin, as the case may be, and there is nothing which can pass by virtue of the assignment.

Plaintiff concedes that when an author fails to survive until the commencement of the last year of the original term, any prior assignment by him is void as against the widow, children and next of kin. But it contends that this is not true as to the executor, because an executor stands in the shoes of his testator and is bound to carry out any agreements entered into by the testator during his lifetime. I cannot agree with this contention. The statute does not differentiate between rights which it vests in the widow and children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those of the other persons named therein. The executor's right to renew in the event that neither the author nor his widow and children survive at the commencement of the renewal period is not a derivative right arising under general testamentary law. It is rather a right arising from the statute itself which has created the right in its own express and limited terms. Since, as has been pointed out, no such right exists apart from the statute, the right cannot be taken away unless the statute expressly so provides. This Congress has not seen fit to do.

Under the scheme of the statute the right of renewal does not follow the ordinary rules of succession. It may be noted, for example, that the widow and children are entitled to renew even though there be a will in which an executor has been designated. Moreover, while the executor may renew if there be no widow or children, there is no mention whatever of an administrator should the author die intestate. In such case, absent widow and children, the renewal right is vested in the next of kin directly. This

statutory scheme, in derogation of the ordinary law of succession is a further indication that the right of renewal does not belong to the author's estate by right of succession, but belongs only to the appropriate person designated in the statute, in this case the executor, who would in turn be obligated to apply for the renewal and distribute the rights so acquired in accordance with the terms of the will.

In Danks v. Gordon, 2 Cir. 272 Fed. 821, an administrator brought an action for infringement of a copyright renewal. The court held that the action was really one for unpaid royalties, and that an administrator has no standing to sue for infringement of a copyright renewal since he is not one of the persons entitled to renew under the statute. The action was dismissed for want of jurisdiction. The court stated at p. 825:

> "* * * It will be noticed that while an executor is mentioned an administrator is not and therefore has been regarded as excluded. White-Smith Music Publishing Co. v. Goff (C.C.), 180 Fed. 256, 258. The right of renewal does not follow the author's estate but the renewal right is derived directly from the statute."

In Fox Film Corp. v. Knowles, 261 U.S. 326, the author died prior to the commencement of the last year of the original copyright term, leaving no surviving widow or children, and his executor subsequently applied for the renewal copyright. The question presented there was whether an executor could, through renewal, obtain rights which his testator never possessed during his lifetime, or whether the executor's right to apply for renewal was limited to the rare situation where the author died during the last year of the original copyright term without having made the necessary application for renewal himself. In holding that the executor's rights are the same as those of the other persons named in the statute, and that the

executor's right to renew is independent of the author's rights at the time of his decease, Mr. Justice Holmes stated (261 U.S. at 329-330):

> "• • • No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had. The limitation is derived from a theory that the statute cannot have intended the executor to take unless he took what the testator already had. We should not have derived that notion from the section • • •."

In Fred Fisher Music Co. v. M. Witmark & Sons, *supra*, the Supreme Court, in holding that an assignment of an author's renewal right was valid if the author survived until such right became vested in him, refers to the author's "*contingent* interest in the renewal" under the 1831 Act prior to the commencement of the period when he could, if living, apply for renewal. (318 U. S. at p. 651.)

In the opinion of the Court of Appeals for this Circuit below in the *Fisher* case, 125 F. 2d 949, the court discussed the effect of the death of an author who had assigned his renewal interest prior to the vesting of his right to renewal and said by way of *dictum* (p. 950):

> "• • •It is also apparent that the assignment here would not have cut off the rights of renewal extended to the widow, children, executors, or next of kin, in the event of Graff's death prior to the renewal period. • • •"

Applying the reasoning of Mr. Justice Holmes in the *Fox Film* case and of the *dictum* of the Court of Appeals of

this Circuit in *Fisher* to the facts before me, I conclude that the executor has the same rights under the statute as the widow and children or next of kin. His right to renew is completely independent of what the author's rights were at the time of his decease. The fact that the author had assigend his inchoate renewal rights to the plaintiff would not have barred his widow, or children, if any, from exercising their statutory renewal rights. See De Sylva v. Ballentine, 351 U. S. 570, 582; Silverman v. Sunrise Pictures Corp., 2 Cir., 273 Fed. 909, 913; Shapiro, Bernstein & Co. v. Bryan, 2 Cir., 123 F. 2d 697, 700. Under the *Fox Film* and *Fisher* cases it is clear that the executor's rights are no less than that of the widow and children or next of kin. They therefore cannot be defeated by the author's prior assignment.[1]

If it be argued that it is incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment, the remedy lies with Congress which passed the statute, and not with the courts. For there is nothing in the language used by Congress which permits a contrary conclusion. The basic purpose of these provisions of the copyright statutes since the Act of 1931 is to give the reward to the author rather than the bookseller. Register of Debates, Vol. 7, Appendix CXIX. The report of the House Committee regarding Section 23 of the Act

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[1] There has been some disagreement among the text writers as to the effect of an assignment by the author upon the executor's subsequent right to renew under the statute. The following writers seem to be of the view that the author assigns only his expectancy, and that his death before the twenty-eighth year of the first term renders any previous assignment of the expectancy invalid; Ball, Law of Copyright and Literary Property (1944) 555-56; Spring, Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising and The Theater (2nd ed., revised) 95; Ladas, International Protection of Literary and Artistic Property (1938) 772-73. For the contrary view, see Drone on Copyright (1879) 327; Shafter, Musical Copyright (2d ed. 1939) 177.

of 1909 (now Section 24) makes it plain that this was also the purpose of that section. H. Rep. 2222, 60th Cong., 2d Sess. pp. 14-15. Indeed, with respect to the renewal rights vested in the executor by the section the Committee stated:

> "* * * Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal."

The contingent interest in the renewal assigned to the plaintiff therefore never vested and was terminated by the death of the author. The renewal right then vested in the executor who could apply for and obtain a renewal which passed to the residuary legatees. They in turn could and did validly assign such rights to the defendant.

Plaintiff's motion for summary judgment is therefore denied and defendant's motion for summary judgment is granted.

However, the relief which defendant seeks by way of damages, an accounting, attorney's fees and the impounding and destruction of infringing copies, plates and moulds will require further proceedings. The order to be entered on these motions will make provision for such further proceedings as may be necessary.

Settle order on 10 days' notice.

Dated: New York, N. Y., December 31, 1957.

FREDERICK V. P. BRYAN,
U. S. D. J.

APPENDIX I.

Dissenting Opinion by Washington, Cir. J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 165—October Term, 1958.

(Argued March 9, 1959 Decided April 23, 1959.)

Docket No. 25339

MILLER MUSIC CORPORATION,
Plaintiff-Appellant,

—v.—

CHARLES N. DANIELS, INC.,
Defendant-Appellee.

Before:

WASHINGTON, WATERMAN and MOORE,
Circuit Judges.

Action for copyright infringement. Appellant and appellee each moved for summary judgment below. The defendant's motion having been granted, Southern District of New York, Bryan, *J.*, the plaintiff appeals. Affirmed.

ABELES & BERNSTEIN (Julian T. Abeles, of counsel), New York City, *for Plaintiff-Appellant.*

LEWIS A. DREYER and JACK M. GINSBERG (Lewis A. Dreyer, Jack M. Ginsberg, New York City; Milton A. Rudin, Payson Wolff, Los Angeles, Calif., of counsel), *for Defendant-Appellee.*

PER CURIAM:

The judgment below is affirmed upon the written opinion of Judge Bryan, reported at 158 F. Supp. 188.

WASHINGTON, *Circuit Judge* (dissenting):

In his opinion below, Judge Bryan recognizes that it may be "incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment * * *" 158 F. Supp. 188, 194 (S. D. N. Y. 1957). In my view, such a result is not only incongruous but without legal justification. In the present case, the will did not purport to bequeath the renewal rights. It was silent as to them. For all we know, the testator may have assumed that his prior assignment would be honored by his executor. But the reasoning of the opinion below extends to a silent will as well as to one in outright derogation of a previous assignment. I think in both cases the assignment should prevail.

Under the present Act, the original term for copyright protection is twenty-eight years, with a further term of twenty-eight years upon renewal. 17 U. S. C. § 24 (1952).[1] According to the scheme of the statute, should the author

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[1] The pertinent language is:

"* * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright. * * *"

die prior to the time when the renewal rights vest in him, any assignment of those rights which he had theretofore made could not defeat the statutory right of the author's widow (or widower) and children to the copyright renewal. Cf. *De Sylva* v. *Ballentine*, 351 U. S. 570, 580 (1956). Similarly, if no widow and children survive, and the author were to leave no will, the renewal rights would vest in the next of kin. Cf. *Silverman* v. *Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), cert. denied, 262 U. S. 758 (1923). Finally, if no widow and children survive, the author nevertheless has the power to "bequeath by will the right to apply for the renewal." H. R. Rep. No. 2222, 60th Cong., 2d Sess. 15 (1909). Under such circumstances the executor is given the power to obtain the renewal. See *Fox Film Corp.* v. *Knowles*, 261 U. S. 326 (1923).

This statutory scheme was created by Congress to protect the author and his family from the author's own improvidence. *Shapiro, Bernstein & Co.* v. *Bryan*, 123 F. 2d 697, 700 (2d Cir. 1941). But even though the intent of Congress was that the renewal rights in the first instance be "exclusive" in the author, and even though the statute was therefore framed so that the author "could not be deprived of that right," H. R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909), there was certainly no intent by the Congress to set up an absolute prohibition on the power to assign the renewal rights. The author not only can assign the original copyright, see, 17 U. S. C. § 28 (1952), but also the renewal copyright as well, once the renewal right has vested in him, see *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 645 (1943). Similarly, "'an agreement to assign his renewal, made by an author in advance of the twenty-eight year of the original term of copyright, is valid and enforceable'." *Id.* at 647. Of course, it has been assumed that this broad power of assignment cannot be construed to defeat the renewal rights which vest in

the widow and children or next of kin when the author dies prior to the twenty-eighth year of the original copyright. See, e.g., *De Sylva* v. *Ballentine, supra,* at 582. But even these renewal rights may be effectively defeated in favor of an assignee if the widow, children, and next of kin all join in the prior assignment by the author. Cf. *Tobani* v. *Carl Fischer, Inc.,* 263 App. Div. 503, 33 N. Y. S. 2d 294, affirmed, 289 N. Y. 727; 46 N. E. 2d 347 (1942). There can thus be no doubt that Section 24 of the Copyright Act does not create any "drastic restriction on free assignability." *M. Witmark & Sons* v. *Fred Fisher Music Co.,* 125 F. 2d 949, 953 (2d Cir. 1942), affirmed, 318 U. S. 642 (1943). This is especially true in light of the whole "history of judicial disapproval of restraints on assignability" 125 F. 2d at 953.

As we have noted, the statute includes the "author's executors" in the class of persons entitled to apply for renewal and extension of a copyright. But this cannot mean that Congress intended the executor to take personally and beneficially, as in the case of a widow or child. "The executor represents the person of his testator * * *" *Fox Film Corp.* v. *Knowles,* 261 U. S. at 330. Therefore, he clearly is to take only in a representative and official capacity in order to prevent the copyright from lapsing and to effectuate any bequest of the renewal right which the testator was entitled to make. See *id.* at 329. For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath those rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs. In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—a contract which was clearly "valid and enforceable" under the *Fisher* case.

In contrast, the opinion below, adopted by the majority of this court, permits an injustice to be perpetrated. It also reinforces an anomaly within the present statutory scheme. Because an executor cannot take office until the author dies, he is the only interested person who cannot join in a prior assignment of renewal rights by the author, and hence—under the reasoning of the opinion below—the only person who can absolutely defeat the rights of the prior assignee. Such is the result in the present case. But it seems highly incongruous and illogical to place the executor, and the people who take under the will, in a position preferred to that of the author's widow and children. Surely this could never have been the result Congress intended. See *De Sylva* v. *Ballentine, supra,* at 582; *Shapiro, Bernstein & Co.* v. *Bryan, supra,* at 700.

APPENDIX II

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty third day of April one thousand nine hundred and fifty nine.

Present:

HON. GEORGE T. WASHINGTON
HON. STERRY R. WATERMAN
HON. LEONARD P. MOORE
Circuit Judges.

MILLER MUSIC CORPORATION,
Plaintiff-Appellant

—v.—

CHARLES N. DANIELS, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX III.

Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075 et seq., U.S.C. Title 17) § 24 (former § 23):

§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered there within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of

copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

IN THE

Supreme Court of the United States

October Term 1959

No. 214

MILLER MUSIC CORPORATION,
Petitioner,

against

CHARLES N. DANIELS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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of Counsel.

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MILLER MUSIC CORPORATION,

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 158 F. Supp. 188. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court upon the opinion of Judge Bryan. The Court of Appeals' *per curiam* decision and the dissenting opinion of Washington, J., appear at 265 F. 2d 925.

Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1959. The Petition for a Writ of Certiorari was filed on July 16, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

Statute Involved

The statutory provision involved is 17 U. S. C. § 24 (former § 23 of the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075), the pertinent portion of which is, as follows:

> "§ 24 DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, * * * *And provided further,* That * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: * * *."

Questions Presented

1. Whether, under the statutory scheme of copyright renewal, as expressed in 17 U. S. C. Sec. 24 (quoted above), the *inter vivos* assignment of the author's renewal interest in a copyright vests any renewal rights in the assignee in the event that the author dies prior to the commencement of the 28th year of the original period of U. S. copyright?

2. Under circumstances in which an author dies prior to the commencement of the 28th year of the original copyright and is not survived by a widow or issue, but does leave a will, does his *inter vivos* assignment of the renewal interest defeat the executor's right of renewal for the beneficiaries under the author's will when it is conceded that such an assignment would not defeat the renewal rights of a widow, widower, child or next of kin?

Statement

Charles N. Daniels, also known as Neil Moret, and Ben Black composed the musical composition "Moonlight and Roses (Bring Mem'ries Of You)", and the composition was registered for copyright on January 9, 1925 (R. 7a-8a).* Since the original term of copyright expired on January 9, 1953, the twenty-eighth year of the original term commenced January 9, 1952. Both Daniels and Black died prior to the commencement of the final year of the original term.

Petitioner, a music publisher, entered into an agreement with Ben Black on October 3, 1946, whereby Black assigned to petitioner all his right and interest as co-author in the renewal copyrights to 18 compositions, including "Moonlight and Roses", in consideration of petitioner's promise to pay certain royalties and the payment of $1,000 as an advance against such royalties (Ex. A, R. 13a-16a). The agreement provided that the royalties earned by the 18 songs would be paid only if petitioner actually acquired the renewal copyright to each such song.

Petitioner also obtained assignments of Ben Black's interest in the renewal copyrights to the 18 songs from Ben Black's brothers, David, Jules and Isidore. These assignments as well as that of Ben Black to petitioner were recorded in the Copyright Office on October 27, 1946 (R. 9a).

Ben Black died testate in California in 1950 leaving no surviving widow or children; his will was duly probated in 1951 (R. 9a). The will made certain specific bequests and provided that the residuary of the estate go to decedent's nieces and nephews.

On January 16, 1952, David Black as sole executor of the Estate of Ben Black, obtained a renewal registration on

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* As in the Petition for Certiorari, record references are to pages of Plaintiff-Appellant's Appendix below.

the copyright of "Moonlight and Roses" and received the certificate of registration (R. 10a). In March, 1952, as part of its decree of final distribution in the probate of the Ben Black Estate, the Superior Court of the State of California, in and for the City and County of San Francisco, ordered distribution of the Estate's interest in "Moonlight and Roses" to the nieces and nephews, including the renewal copyright therein (R. 10a).

On May 1, 1952, Ben Black's nieces and nephews, and the executor of his Estate, entered into an agreement assigning to Respondent all their right, title and interest, vested or contingent, in and to certain musical compositions including "Moonlight and Roses", together with the renewal copyrights therein (R. 11a).

Respondent had previously obtained the interest of the co-author, Charles N. Daniels, in the renewal term (R. 10a-11a, Ex. E, R. 24a), and upon commencement of the renewal term on January 9, 1953, began the publication, exploitation and licensing of "Moonlight and Roses" as the sole owner of the entire United States renewal copyright.

The dispute herein concerns the Ben Black interest only. Petitioner (plaintiff below) maintains that it is entitled to partial ownership in the renewal copyright by virtue of the *inter vivos* assignments it received from Ben Black and his brothers.

Respondent contends that the contingent right which Ben Black had assigned to petitioner never materialized since, by reason of Black's death prior to the twenty-eighth year of the original term, the executor succeeded to the separate and independent renewal right under the system of succession established by Congress in 17 U. S. C. § 24.

Both parties moved for summary judgment upon an agreed statement of facts and a series of documentary exhibits annexed thereto. The District Court denied petitioner's motion, and granted respondent's; the complaint

was dismissed and judgment upon respondent's counterclaim entered, enjoining petitioner from making any claim to ownership of the renewal copyright in "Moonlight and Roses."

The Court's ruling in favor of respondent was based upon thoroughly established copyright law: that until the last year of the original copyright term, the author has merely a contingent interest in the renewal copyright; that an author's prior assignment of the renewal copyright is effective only if he survives into the last year of the original term; that if he fails so to survive, the right of renewal, being an entirely separate and independent grant, vests in his widow, children, executor or next of kin, according to the system of succession established by Congress; that Ben Black's assignment to petitioner would concededly have been void as against a widow, child, or (had he died intestate) his next of kin; and that Section 24 of the Copyright Act makes no exception in the case of an executor who obtains the renewal rights as representative of the residuary legatee.

Accordingly, the Court concluded that the executor's right to renew was independent of the author's right during his lifetime, and that petitioner's contingent assignment failed because the rights purportedly conveyed in the assignment never vested.

The Court of Appeals affirmed the District Court's judgment and adopted Judge Bryan's opinion. Judge Washington's dissent urges broadly that, since an author may make an assignment of his contingent interest in the renewal copyright which will be binding upon him once the renewal rights vest, so should this assignment of rights, which never vested in the author, be binding upon his executor even in the face of a will whose terms are in derogation of the assignment.

Argument

1. Petitioner's principal contention is that the decision below is in conflict with existing authorities governing renewal copyrights. An examination of the cases cited by petitioner, however, indicates that the courts below scrupulously followed these decisions insofar as they are determinative of the issue at bar.

Fox Film Corporation v. *Knowles*, 261 U. S. 326 (1923), did not involve an *inter vivos* assignment by the author; clearly "the precise issue * * * for determination" [Pet. for Cert. p. 12] was not at all the same as in the within action.

In the *Fox Film* case, the author of two copyrighted poems died two years prior to the expiration of the existing term of copyright leaving neither widow or children. The executor under his will obtained the copyright renewal and subsequently assigned the dramatic rights in the poems of plaintiff. Defendant apparently conceded copying, but contended that the executor did not have the right to renew the copyright. Since the renewal right is a separate estate which comes into being one year prior to the expiration of the existing term, and since the author at the time of his death could not have renewed, then, defendant urged, neither could the executor renew. "[T]he statute gave nothing to the executor except when the testator had the right to renew at the moment of his decease." 261 U. S. at 329.

In his opinion, Mr. Justice Holmes rejected the defendant's argument and followed reasoning closely akin to that of Judge Bryan in the within action; that is, the widow, children or next of kin can clearly renew in the circumstances involved; and there is nothing in the statutory grant putting an executor in a position any different from theirs. Implicit in the Court's opinion is the holding that the renewal copyright is an estate separate from that of the

author's original term of copyright, devolving upon the widow, child, executor or next of kin, as the case may be, independently of the author's survival into the last year of the original term. See also, *De Sylva* v. *Ballentine*, 351 U. S. 576 (1956).

Fred Fisher Music Co. v. *M. Witmark & Sons*, 318 U. S. 643 (1943), involved an assignment by the author of his expectancy in the renewal copyright during the original term and gave his assignee, Witmark, a power of attorney to apply for the renewal in the author's name. During the twenty-eighth year of the original term, both the assignee and the author, who was still alive, applied for the renewal copyright. Subsequently the author assigned his renewal to another publisher, Fred Fisher Music Co.

Since the author had survived into the twenty-eighth year, there was no question of conflict with a widow, child, executor or next of kin. Rather, the issue was drawn between two assignees of an author whose renewal rights had vested in him by reason of such survival. This Court held that the Copyright Act does not nullify the author's agreement made during the original copyright term to assign his renewal, and that the prior assignment by the author of rights which he eventually acquired was binding upon him.

It does not follow, from the *Fred Fisher Music Co.* case, as petitioner apparently urges [Pet. for Cert. p. 11], that "[a]ccordingly, the executor's right of renewal is not derived solely and directly from the statute * * *." That case never considered or purported to determine the basis upon which an executor renews. Neither does the opinion below rest upon the assumption that the executor acts, independently of any right of the testator, personally and beneficially for his own account.

The Court below decided that the contingent rights which the author assigned to petitioner never vested, and

that petitioner accordingly got nothing. Because the executor's renewal right was independent of the author's (as are the widow's and child's or next-of-kin's), and because the author's will so directed, the executor rightfully distributed the renewal copyright to respondent's assignors. There is nothing in Judge Bryan's decision or opinion that conflicts with the *Fred Fisher Music Co.* case, or any other decision of this Court.

The petition here also errs in stating (p. 11) that in *De Sylva* v. *Ballentine*, 351 U. S. 570 (1956), this Court said that a binding assignment through an executor may be made in the absence of a widow, widower or child, when, as here, the author dies prior to the twenty-eighth year of the original term and the will is in derogation of his *inter vivos* assignment. The *De Sylva* case decided, in circumstances in which the author died prior to the twenty-eighth year of the original term, leaving a widow and children, that the statutes vests the renewal copyright in the widow and children as a class rather than in the widow exclusively. No question of the author's *inter vivos* assignments, or the executors' rights and duties was even remotely involved. In tracing the development of the renewal term, however, this Court did construe its holding in the *Fred Fisher Music Co.* case (as we have *supra*), to mean that prior to the twenty-eighth year of the original term the author assigns only the "*expectancy in his future rights of renewal*," 351 U. S. at 574 (emphasis supplied), and not the renewal copyright itself or the expectancy of the widow, child, executor, or next of kin.

2. Petitioner's other contention—that the decision below involves a question of widespread significance not previously settled by this Court—is unconvincing. Judge Bryan stated (158 F. Supp. at 190), that there have been no reported cases on the issue presented here, although the particular statute in question has been on the books in its present form since 1870. This is some indication, we submit, of the narrow application of the issue here presented.

Mr. Abeles states, in a personal observation (Pet. for Cert. p. 19), that assignments of renewal interests by authors, in the same category as the assignment in the instant case, have been entered into in good faith by authors and music publishers upon the assumption that such assignments were valid and enforceable. The authors of this brief are as familiar with prevailing agreements in the music publishing industry and with renewal assignments as is Mr. Abeles, and we have personally examined a number of renewal agreements prepared by Mr. Abeles for his clients, as well as hundreds of others. In practically every case, the music publisher who negotiates for the acquisition of renewal rights, insists on assignments from wives, children and next of kin, if such assignments can be obtained. All of such agreements of assignment are made "upon the assumption that they were valid and enforceable". The sole reason for obtaining the signatures of the members of the author's family, as well as his own, is the knowledge that the author's rights are contingent upon his surviving the 27th year of the original period of copyright. Even had Ben Black been married, and the signature of his wife obtained by petitioner, the interest of the widow would have been contingent upon her surviving into the 28th year of original copyright. The right to renew of every class mentioned in Section 24 of the Copyright Act is contingent upon survival of that original term.

Mr. Abeles and his client fully realized that in the case of "Moonlight and Roses," they were buying only a chance to obtain the renewal of the Ben Black interest, contingent upon his survival as aforesaid. Why, otherwise, did they promptly proceed to obtain assignments from Ben Black's next of kin? The next of kin could not possibly have had any interest in the renewal copyright unless Ben Black did not survive the 27th year of the original period of copyright.

Mr. Abeles seeks assurance that every assignment of renewal rights made in good faith should be enforcible.

But no decision of this Court can furnish such assurance. An assignment in which all of the author's family join would not be effective against his then unborn or minor children or against a widow to whom he was not married at the time of the assignment, or against then unborn or minor next of kin.

The decision below, moreover, does not invalidate Ben Black's assignment to petitioner. Had Black survived into the twenty-eighth year, petitioner would clearly have obtained the renewal rights under the *Fred Fisher Music Co.* case. The chance that he would not so survive, and the consequent lapse of the author's right to renew, was the risk which petitioner knowingly took, and paid for, which accounts for the bargain price of $1,000 for 18 songs, chargeable against royalties which would be payable only if petitioner actually acquired the renewal copyrights in question.

3. The decision below is correct and, contrary to the assertion of petitioner, does not lead to an incongruous result.

Petitioner's claim is based upon an assignment of a future, and necessarily contingent, right. Petitioner conceded below, 158 F. Supp. at 192, that if the author were not alive during the twenty-eighth year of the original copyright term, and if the author were survived by a widow or child, the right to apply for and obtain a renewal copyright would vest in such widow and/or child, without accountability to petitioner; petitioner also conceded that, if there were no widow or child and if the author died intestate, such right would vest in his next of kin.

Thus, the interest which Ben Black assigned to petitioner was an "expectancy" only. *De Sylva* v. *Ballentine*, 351 U. S. 570, 574 (1956); *Rossiter* v. *Vogel*, 134 F. (2d) 908 (2d Cir. 1943). Upon Black's death prior to the twenty-eighth copyright year the expectancy lapsed, and the right to renew passed to the next elibigle class under the system of succession established by Congress in 17 U. S. C. § 24.

To argue, as petitioner does, that the executor represents "the person of his testator", begs the question, as clearly stated by Judge Bryan below, 158 F. Supp. at 189-190:

> "The question presented here is whether the assignment of his renewal rights by Ben Black, one of the co-authors of the song, to plaintiff prior to the time when they accrued at the commencement of the last year of the original term of the copyright was defeated by the author's death before the perio commenced within which renewal could be made."

In *Fox Film Corp.* v. *Knowles*, 261 U. S. 326 (1923), this Court rejected the argument that the executor's right to renewal is dependent upon the author's rights at the time of his death, and held, as did the Court below, that the executor's renewal rights arise out of a separate and independent grant by Congress.

Gibran v. *Alfred A. Knopf, Inc.*, 153 F. Supp. 854 (S. D. N. Y. 1957), aff'd 255 F. (2d) 121 (2d Cir. 1958), is entirely consistent with this holding and further supports respondent's position. There the author, who left neither widow nor children, did leave a will but failed to name an executor, as a result of which administrators c.t.a. were appointed. The contest was between the administrators and the next of kin for the renewal right. It was held that the renewal right vested in the administrators c.t.a. because for all practical purposes they were the equivalent of an executor.

The language of Judge Weinfeld's opinion, 153 F. Supp. at 857-8, is significant in its emphasis on Congressional intent to protect the author's residuary legatees (represented by the executor) in the absence of a widow and children:

> "The House committee report (also adopted as the Senate committee report) which accompanied the renewal section prior to its enactment by the Congress shows that its purposes were first to protect

> the author against his own improvident conduct in surrendering renewal rights during the original term; second, to set up a statutory scheme of priority in the renewal rights for the benefit of those naturally dependent upon, and properly expectant of, the author's bounty; and third, to permit the author who had no wife or children to bequeath by will the right to apply for renewal.
>
> "To construe 'executors' as used in the statute in the very strict and literal manner urged by the sister would defeat the purpose and intent of Congress to permit an author to bequeath the renewal rights. * * *"

The decision below carries out the intent of Congress in protecting the author's right to bequeath the renewal rights by will. It follows existing law to the effect that the assignment by Ben Black to Petitioner was of an expectancy only, contingent upon Black's survival into the 28th year of the original term. It follows the statutory language and legislative history to the effect that no distinction or exception is created with respect to the renewal by an executor, as compared to the renewal by the widow, children, or next of kin.

4. The Petition for a Writ of Certiorari completely overlooks the California law problem which is, or may be, an integral part of the decision in this case. We agree with Judge Bryan's conclusion, 158 F. Supp. at 191, that "one who claims as a stranger to the estate or adversely to the estate, rather than as an heir, devisee or legatee, will not be bound by a decree of distribution since the jurisdiction of the probate court is limited to rights granted in privity with the estate and does not extend to the rights or titles of adverse claimants."

That, however, was not our contention. The complaint alleged that decedent "bequeathed by Will" the right of his executor "to apply for the renewal of said copyright in said musical composition for and on behalf of plaintiff." Re-

spondent, in the trial court below, accordingly urged that, insofar as petitioner claimed by reason of a bequest of Ben Black, judgment must be rendered against petitioner because it would then be claiming not as a stranger to the estate but as a devisee, and would be bound by the decree of distribution.

Petitioner has apparently abandoned any hope of seeking an adjudication that the renewal right of the executor is exercised for the benefit of the next of kin. To the extent, however, that the petitioner's argument herein is construed to claim the renewal copyright interest as a person entitled to distribution of assets of the Estate of Ben Black, the state law question remains for determination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BRIEF FOR PETITIONER

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 24-33) is reported in 158 F. Supp. 188. The judgment of the District Court was affirmed by the United States Court of Appeals for the Second Circuit upon the opinion below (R. 36), with a dissenting opinion by Washington, Cir. J. (R. 36-39) which is reported in 265 F. 2d 925.

Jurisdiction

The judgment of the District Court in favor of respondent (defendant below), was entered on February 28, 1958 (R. 34, 35). The judgment of the Court of Appeals, affirming the judgment of the District Court, was entered on April 23, 1959 (R. 40). No petition for rehearing of said cause was filed. Petitioner filed its petition for a writ of certiorari on July 16, 1959, and such petition No. 214 was granted on October 12, 1959 (R. 41).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1952).

Statute Involved

The only statute involved is § 24 (former § 23) of the Copyright Act of 1909, Act of March 4, 1909, c. 320, 35 Stat. 1075, *et seq.*, U.S.C. Title 17 (Appendix).

Questions Presented For Review

Whether under § 24 of the Copyright Act of 1909:

(1) There is any legal justification for the determination of the Court of Appeals that the statute "does not differentiate between rights which it vests in the widow and children, the executor and the next of kin" and therefore (a) the executor takes such renewal rights for himself personally and beneficially and not in trust as the representative of the person of his testator, and (b) such renewal rights of the executor "cannot be defeated by the author's prior assignment".

(2) The executor of an author who, having no wife or children, had made an assignment of his renewal interest in the work to a publisher for a valuable consideration, and had then made a will which contains no specific bequest of

such renewal interest, and had died before the accrual of the right of renewal leaving no widow or children, could in derogation of the author's said assignment, effectuate a subsequent assignment of the renewal from the residuary legatees to another publisher.

Statement Of The Case

The cause of action of plaintiff, a music publisher, is for the infringement by defendant, a music publisher, of the rights, title and interest of plaintiff through one Ben Black, as co-author, in the renewal copyright of a musical composition entitled "Moonlight And Roses (Bring Mem'ries Of You)" (R. 2-6).

Both parties moved for summary judgment (R. 22, 23). The District Court denied plaintiff's motion and granted defendant's motion, dismissing the complaint on the merits and rendering judgment on its counterclaim enjoining plaintiff from infringing defendant's alleged rights, title and interest through said Ben Black in said renewal copyright, and restraining plaintiff from making any claims with respect to the ownership of said renewal copyright (R. 34, 35).

The respective motions for summary judgment were based upon an agreed statement of facts and conclusions of law (R. 6-11). Following are the material facts so stipulated (the preceding numbers indicating the respective paragraphs of the stipulation and "Ex." indicating the particular exhibit annexed thereto):

3—Prior to January 10, 1925, said Ben Black (referred to as "Decedent") and one Charles Neil Daniels wrote the said musical composition (referred to as "Said Composition") (R. 6).

5—Prior to January 10, 1925, they assigned to Villa Moret, Inc., a music publisher, Said Composition and the right to secure copyright therein in its name (R. 7).

6—In 1925, the said assignee secured United States copyright in Said Composition for the original term of 28 years (R. 7).

8—Under date of October 3, 1946, Decedent entered into a written agreement with plaintiff (Ex. A, R. 11-15) under which Decedent transferred, assigned and set over to plaintiff all rights and interests whatsoever as co-author, "now or at any time or times hereafter known or in existence", in and to the renewal and extension of the United States copyright in Said Composition and other compositions, in consideration of which plaintiff agreed to pay certain royalties for the renewal term and the sum of $1,000.00 on account and in advance thereof. Decedent covenanted, undertook and agreed to make, execute and deliver any and all further instruments, documents and writings "for the purpose of perfecting and confirming" such rights and interests in plaintiff (R. 7).

9—The said sum of $1,000.00 was paid by plaintiff to Decedent upon the signing of the said agreement (R. 8).

10—Under date of October 14, 1946, pursuant to the said agreement, Decedent executed a separate short form instrument for recording in the Copyright Office (Ex. A1, R. 15), whereby "for and on behalf of himself and all other parties in interest" he transferred, assigned and set over to plaintiff "all rights and interests whatsoever, then or thereafter in existence", in the renewal and extension of the United States copyright in Said Composition. Decedent had no wife or child, and his sole next of kin were three brothers. Accordingly, for the express purpose of assuring plaintiff that, in the event of his death prior to the accrual of the renewal right without making a will,

plaintiff would be certain of acquiring the renewal through his surviving next of kin, Decedent procured and delivered to plaintiff a like separate instrument of assignment from each of his three brothers to plaintiff of his renewal expectancy (Exs. A2, A3, A4, R. 16-19). Each of said assignors covenanted, undertook and agreed to make, execute and deliver any and all further instruments, documents and writings "for the purpose of perfecting and confirming" such rights and interest in plaintiff (R. 8).

11—The four separate instruments of assignment (referred to in paragraph 10, *supra*) were duly recorded in the Copyright Office (R. 8).

12—Under date of June 1, 1950, Decedent executed a will (Ex. B, R. 19-21) in which he made provision for the discharge of the "proper claims and charges against my estate". There was no specific bequest of the said renewal copyright in Said Composition. The residuary estate was left to the children of Decedent's brothers who had joined in the assignment to plaintiff. The will recites "I hereby declare that I am single and that I leave no issue surviving me" (R. 8).

13—On December 26, 1950, Decedent died in the State of California, leaving no widow or child. On February 13, 1951, his will was admitted to probate in the Superior Court of the State of California (R. 8).

14—David Black, one of Decedent's brothers who had joined in the assignment to plaintiff, qualified as the sole executor of the will (R. 8).

15—On January 16, 1952, said David Black, as executor, renewed the copyright in Said Composition for the further term of 28 years from January 10, 1953 (R. 9).

16—On March 24, 1952, final distribution of the property of the estate was decreed by the court (R. 9).

19—Under date of May 1, 1952, defendant entered into an agreement with the aforesaid nephews and nieces of Decedent, the residuary legatees under Decedent's will, whereby they assigned to defendant "all their right, title and interest" in said renewal (Ex. E, R. 21). Upon the petition of Decedent's brother, David Black, as executor, said agreement was approved by the Superior Court (R. 9, Ex. F, R. 21).

20—Defendant entered into an agreement for the acquisition of the interest through the co-writer, Charles Neil Daniels, in the renewal copyright in Said Composition, which interest is not at issue in this action (R. 9-10).

Summary Of Argument

The determination of the District Court (R. 24-33) and of a majority of the Court of Appeals (R. 36) is based upon the erroneous legal premise that the renewal rights which the statute "vests" in the executor are no different than those vested in the widow, children and next of kin; that is to say, that the executor takes for himself personally and beneficially, and not in trust as the representative of the person of his testator. In this respect the District Court and the majority of the Court of Appeals, while recognizing that such a construction may produce "incongruous" results (R. 32), nevertheless concluded (R. 29, 32):

> "The statute does not differentiate between rights which it vests in the widow and children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those of the other persons named therein . . . I conclude that the executor has the same rights under the statute as the widow and children or next of kin . . . it is clear that the executor's rights are no less than that of the widow and children or next

of kin. They therefore cannot be defeated by the author's prior assignment."

It is petitioner's contention:

1. That while the renewal rights are vested in the widow, children and next of kin for themselves personally and beneficially, such rights are obtained by the executor as the representative of the person of his testator, in trust to effectuate the author's disposition thereof either by assignment or bequest.

2. That in the absence of a widow and children, there is no statutory restraint upon an author effecting an assignment of his renewal expectancy through his executor.

3. That § 24 takes the form of a compulsory bequest of the renewal to the widow and children, it being the intention of the section to permit the author who has no wife or children to bequeath by will the right of the executor to apply for the renewal, and thereby effectuate the author's disposition thereof either by assignment or bequest.

POINT I

There being no widow or child the executor, in representing the person of his testator under the purview of Section 24, is possessed of the same power that the testator might have exercised if alive.

In *Fox Film Corporation* v. *Knowles*, 261 U. S. 326, 43 Sup. Ct. 365, this precise issue was for determination. This Court reversed the decree in 279 Fed. 1018 (Cir. 2), which decree had affirmed the decrees of the District Court in two cases, 274 Fed. 731 (E.D.N.Y.) and 275 Fed. 582 (S.D.N.Y.).

In each of the cases between the same parties and involving the same questions of fact and law, the defendant's motion to dismiss the complaint had been granted. The decedent, Will Carleton, had died in 1912. As in the instant case, he died prior to the renewal period, no widow or child survived him, he left a will, and the executor applied for the renewal during the renewal period.

The District Court, in 274 Fed. 731, dismissed the complaint upon the ground (pp. 733, 734):

> "It is apparent that in 1915 the decedent, Will Carleton, had no power to make any disposition with respect to the copyright then in existence. * * * He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived."

The determination of the District Court, in 275 Fed. 582, was to the same effect.

In 279 Fed. 1018, the Court of Appeals, Second Circuit, affirmed the decrees of both District Courts, on the authority of its prior determination in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, cer. den. 262 U. S. 758, 43 Sup. Ct. 705. In that case the Court, while recognizing that there was no distinction under the statute between an assignment or devise by the author of his renewal interest, held that as the author had died before the statutory year neither his assignment nor devise of such interest could be effective, saying (p. 913):

> "But what may be assigned can ordinarily be devised, and it results that before the statutory year the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly the testatrix had as yet nothing to leave. If, however, the author lives to within the statutory year,

he may certainly exercise his right, to assign it, or bequeath it; and if he dies in the year, but before the registration, it is for his executors to function."

This Court, in reversing the decree of the Court of Appeals, expressly held (261 U. S. 326, 330) that, under the purview of § 24, if there is no widow or child "The executor represents the person of his testator," in acquiring and administering the renewal rights, since "the words specially applicable seem to us plainly to import that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive."

In Shafter, Musical Copyright, 2d Edition, page 177, the writer, in speaking of the executor's obligation to effectuate the author's assignment of his renewal interest to a publisher, said:

> "While the point has never been legally determined, it would appear that an executor, representing the *person* of his testator, could be compelled to renew and reassign the copyright to the publisher, since the status of the executor is the same as though the testator were living." (Writer's italics)

In *Gibran* v. *Alfred A. Knopf, Incorporated,* 153 F. Supp. 854, 859, 860 (D.C.S.D. N. Y.), affd. 255 F. 2d 121 (Cir. 2), cer. den. 358 U. S. 828, 49 Sup. Ct. 47, the District Court said:

> "Who is entitled to the benefits of the renewed copyright—the sister as the sole surviving next of kin or the Town of Bechari, Lebanon, under the will? Here the contention is that under the statute the sole right given to an author who is not survived by a spouse or children is a testamentary privilege simply to name an executor to apply for renewal. It is urged that once the renewal is obtained by a designated executor he holds the copyright in trust solely for

> the next of kin of the decedent and not for the benefit of any designated beneficiary or as part of the general estate.
>
> • • • • •
>
> The contended for construction would deprive an author, if he died without surviving spouse or children, of the right to dispose of renewal copyrights, contrary to congressional intent."

The Court of Appeals, Second Circuit, in affirming, said (p. 123):

> "Judge Weinfeld was plainly right in holding that the plaintiffs had the power and indeed the duty to renew the copyrights and to hold them for the benefit of the testator's 'home town'."

Accordingly, in *Silverman* v. *Sunrise Pictures Corporation, supra,* the Court of Appeals, Second Circuit, recognized that there was no distinction under the statute between the power of the executor to effectuate a renewal assignment or devise, and in *Gibran* v. *Alfred A. Knopf, Incorporated, supra,* the same Court held that the renewal was acquired by the executor as the representative of the person of his testator, in trust to effectuate the author's disposition thereof. Yet in the instant case the same Court held that the author's renewal assignment was unenforceable, because the executor takes for himself personally and beneficially and not in trust as the representative of the person of his testator.

As Judge Washington said in his dissenting opinion (R. 38, 39):

> "As we have noted, the statute includes the 'author's executors' in the class of persons entitled to apply for renewal and extension of a copyright. But this cannot mean that Congress intended the executor to take personally and beneficially, as in the case of

a widow and child. 'The executor represents the person of his testator * * *' Fox Film Corp. v. Knowles, 261 U. S. at 330. Therefore, he clearly is to take only in a representative and official capacity in order to prevent the copyright from lapsing and to effectuate any bequest of the renewal right which the testator was entitled to make. See id. at 329. For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath those rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs."

POINT II

Any intended statutory restraint upon the power of the executor to effectuate the author's disposition of his renewal interest would have been manifested.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 63 Sup. Ct. 730, this Court stated that the sole question for determination by it was as follows (pp. 643, 647):

"The question itself can be stated very simply. Under § 23 of the Copyright Act of 1909, 35 Stat. 1075, as amended, a copyright in a musical composition lasts for twenty-eight years from the date of its first publication, and the author can renew the copyright, if he is still living, for a further term of twenty-eight years by filing an application for renewal within a year before the expiration of the first twenty-eight year period. Section 42 of the Act provides that a copyright 'may be assigned . . . by an instrument in writing signed by the proprietor of the copyright . . .' Concededly, the author can assign the

original copyright and, after he has secured it, the renewal copyright as well. The question is—does the Act prevent the author from assigning his interest in the renewal copyright before he has secured it?

• • • • •

"The petition for certiorari in this Court stated that the 'sole question is whether . . . an agreement to assign his renewal, made by an author in advance of the twenty-eighth year of the original term of copyright, is valid and enforceable.' Because of the obvious importance of this question of the proper construction of the Copyright Act, we brought the case here. 317 U. S. 611.

Plainly, there is only one question before us—does the Copyright Act nullify an agreement by an author, made during the original copyright term, to assign his renewal?"

With respect to the wording of the Act, this Court said (p. 647):

"No limitations are placed upon the assignability of his interest in the renewal. If we look only to what the Act says, there can be no doubt as to the answer. But each of the parties finds support for its conclusion in the historical background of copyright legislation, and to that we must turn to discover whether Congress meant more than it said."

Then, upon examining the historical background, this Court, in noting that under the Act of May 31, 1790 (1 Stat. 124), enacted by the first Congress, renewal rights were given to the author or authors, "his or their executors, administrators or assigns", said (p. 650):

"In view of the language and history of this provision, there can be no doubt that if the present case had arisen under the Act of 1790, there would be no

statutory restriction upon the assignability of the author's renewal interest. The petitioners contend, however, that such a limitation was introduced by subsequent legislation, particularly the Copyright Acts of 1831 and 1909."

This Court further noted that, under the Act of February 3, 1831 (4 Stat. 436), the renewal rights were only given to the author, and "the author's widow or children." Yet this Court said (p. 651):

"But neither expressly nor impliedly did the Act of 1831 impose any restraints upon the right of the author himself to assign his contingent interest in the renewal."

Then coming to the present Act of March 4, 1909 (35 Stat. 1075), this Court concluded that the basic consideration of policy underlying the present Act was to give the author the right to dispose of his renewal interest separate and apart from the original copyright saying (pp. 653-654):

"By providing for two copyright terms, each of relatively short duration, Congress enabled the author to sell his 'copyright' without losing his renewal interest. If the author's copyright extended over a single, longer term, his sale of the 'copyright' would terminate his entire interest. That this is the basic consideration of policy underlying the renewal provision of the Copyright Act of 1909 clearly appears from the report of the House committee which submitted the legislation (the Senate committee adopted the report of the House committee, see Sen. Rep. 1108, 60th Cong., 2d Sess.)."

This Court determined that any statutory restraints intended to be imposed upon the assignment by authors of

their renewal interest would have been manifested, saying (pp. 655-657):

> "If Congress, speaking through its responsible members, had any intention of altering what theretofore had not been questioned, namely, that there were no statutory restraints upon the assignment by authors of their renewal rights, it is almost certain that such purpose would have been manifested. The legislative materials reveal no such intention.
>
> We agree with the court below, therefore, that neither the language nor the history of the Copyright Act of 1909 lend support to the conclusion that the 'existing law' prior to 1909, under which authors were free to assign their renewal interests if they were so disposed, was intended to be altered. We agree, also, that there are no compelling considerations of policy which could justify reading into the Act a construction so at variance with its history. • • •
>
> We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests."

POINT III

The only restraint under Section 24 upon the author's power to dispose of his renewal interest through his executor is for the protection of his widow and childen, if any, in the form of a compulsory bequest to them.

The pertinent part of § 24 provides that the author "if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors" shall be entitled to the renewal. In *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra,* the author being alive at the time of the accrual of the right of re-

newal, this Court determined, as aforesaid, that there was no statutory restraint upon the author's assignment of his renewal interest.

In the instant case, as the author was not living at the time of the accrual of the right of renewal, the only statutory restraint upon the author's disposition of his renewal interest was the survival of a widow or children. No widow or children having survived him, he had the unrestricted right of the disposition of his renewal interest through the designation of an executor to effectuate the same.

In *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra,* this Court pointed out (p. 655) that the report of the House Committee (H. Rep. 2222, 60th Cong., 2d Sess., pp. 14, 15) adopted by the Senate Committee (Sen. Rep. 1108, 60th Cong. 2d Sess.) specifically expressed the intention of § 24 (former § 23) "to permit the author who had no wife or children to bequeath by will the right to apply for the renewal."

In *De Sylva* v. *Ballentine,* 351 U. S. 570, 582, 76 Sup. Ct. 974, this Court, in noting that the only restraint under § 24, upon the right of an author to "assign" his renewal interest was for the protection of his widow and children, said:

> "The evident purpose of § 24 is to provide for the family of the author after his death. Since the author cannot assign his family's renewal rights, § 24 takes the form of a compulsory bequest of the copyright to the designated persons."

Likewise, in *Shapiro, Bernstein & Co. Inc.* v. *Bryan,* 123 F. 2d 697, 700, the Court of Appeals, Second Circuit, said, in referring to the pertinent proviso of § 24 ("or the widow, widower, or children of the author, if the author be not living"), "The limitation which the second proviso imposes upon the author's power to dispose of the right

of renewal during his life" was "clearly intended to protect widows and children from the supposed improvidence of authors in the colloquial sense."

No intention is expressed or implied that in representing "the person of his testator" and exercising "the power that the testator might have exercised if he had been alive" (*Fox Film Corporation* v. *Knowles, supra*), the executor is not obligated to effectuate the testator's renewal assignment.

The executor is the only designated person who does not acquire the renewal for himself personally and beneficially. If it were intended that, there being no widow or children, the author's right of disposition of his renewal interest be confined to his testamentary beneficiaries, then "the beneficiaries under the author's will" would have been specifically designated after the widow and children, to take for themselves personally and beneficially the same as the other designated persons. There could have been no possible purpose in designating the executor other than to provide that, in representing "the person of his testator", he should exercise "the power that the testator might have exercised if he had been alive," in effecting the author's disposition of his renewal interest.

If the author had not executed a will, having died leaving no widow or children, the plaintiff would have acquired the renewal under the assignment from the author's sole next of kin. Having left a will the author, who had no widow or children, thereby bequeathed by will the right of the executor to apply for the renewal and effectuate the author's assignment to plaintiff. (*Fred Fisher Music Co.* v. *M. Witmark & Sons, supra*, p. 655.) The author having made no specific bequest of the renewal rights, must he not have assumed that his executor would honor his assignment, as he would any other obligation of the testator?

As Judge Washington said in his dissenting opinion (R. 37, 39):

> "In the present case, the will did not purport to bequeath the renewal rights. It was silent as to them. For all we know, the testator may have assumed that his prior assignment would be honored by his executor. But the reasoning of the opinion below extends to a silent will as well as to one in outright derogation of a previous assignment. I think in both cases the assignment should prevail.
>
> * * * * *
>
> In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—a contract which was clearly 'valid and enforceable' under the Fisher case.
>
> In contrast, the opinion below, adopted by the majority of this court permits an injustice to be perpetrated. It also reinforces an anomaly within the present statutory scheme. Because an executor cannot take office until the author dies, he is the only interested person who cannot join in a prior assignment of renewal rights by the author, and hence—under the reasoning of the opinion below—the only person who can absolutely defeat the rights of the prior assignee. Such is the result of the present case. But it seems highly incongruous and illogical to place the executor, and the people who take under the will, in a position preferred to that of the author's widow and children. Surely this could never have been the result Congress intended. See De Sylva v. Ballentine, supra, at 582; Shapiro, Bernstein & Co. v. Bryan, supra, at 700."

POINT IV

This Court has said that a meaning should not be applied in the construction of a statute which will produce incongruous results.

The author, upon the execution and delivery of his assignment to plaintiff, procured the execution and delivery to plaintiff of assignments by his three brothers, as sole next of kin, of their respective contingent renewal interests.

Plaintiff was thereby induced to contract with the author for the acquisition of the renewal interest and pay an advance against royalties to accrue during the renewal period.

Under the construction of the Court below an author having no wife or child could assign his renewal expectancy to one publisher for a consideration and then, through the devise of a will, effectuate a second assignment either by a direct bequest or, as in the instant case through residuary legatees, to another publisher. Obviously, under such circumstances no publisher would contract with an author for his renewal expectancy. In the case of an author, who has written many successful works, this would deprive the author, who might die prior to the renewal accrual, of the substantial benefits thereof which would otherwise inure to him.

Congress could not have intended to grant an author the right to assign his renewal interest and yet, at the same time, intend to vitiate completely that right by making it impossible for him to secure compensation for such an assignment.

The following reasoning of this Court in *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra* (p. 657) is pertinent:

> "If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for

> something he cannot sell. * * * We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests."

Judge Washington in his dissenting opinion, in commenting upon the incongruous result which the Court below recognized its construction might produce, said (R. 36, 37):

> "In his opinion below, Judge Bryan recognizes that it may be 'incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment * * *' 158 F. Supp. 188, 194 (S. D. N. Y. 1957). In my view, such a result is not only incongruous but without legal justification."

In *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270, 286, this Court in refusing to accept petitioners' proposed construction of a provision of the National Labor Relations Act, said:

> "Petitioners' construction would produce incongruous results."

Likewise, in *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282, 288, this Court said, referring to the basis of its prior determination in *Mastro Plastics Corp.* v. *National Labor Relations Board, supra*:

> "Moreover, in Mastro Plastics we cautioned against accepting a construction that 'would produce incongruous results.' Id., at 286."

CONCLUSION

Petitioner respectfully submits that this Court should reverse the judgment of the Court below and find that petitioner herein, as the assignee of the co-author Ben Black, is possessed of the interest through him in said renewal copyright.

Dated: New York, N. Y., November 30, 1959.

Respectfully submitted,

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APPENDIX

Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075, *et seq.*, U.S.C. Title 17) § 24 (former § 23):

§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

IN THE

Supreme Court of the United States

October Term—1959

No. 214

MILLER MUSIC CORPORATION,
Petitioner,

against

CHARLES N. DANIELS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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Opinions Below

The opinion of the United States District Court for the Southern District of New York, Bryan, J. (R. 24-33), is reported at 158 F. Supp. 188. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court upon the opinion of Judge Bryan. The Court of Appeals' *per curiam* decision and the dissenting opinion of Washington, J. (R. 36-39), appear at 265 F. 2d 925.

Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1959 (R. 40). The petition for a Writ of Certiorari was filed on July 16, 1959, and was granted on October 12, 1959 (R. 41). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

Statute Involved

The statutory provision involved is 17 U. S. C. § 24 (former § 23 of the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075), the pertinent portion of which is, as follows:

> "§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, * * * *And provided further*, That * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: * * *."

Questions Presented

1. Under the statutory scheme of copyright renewal, as expressed in the statute quoted above, does the *inter vivos* assignment of the author's renewal interest in a copyright vest the renewal rights in his assignee if the author dies prior to the commencement of the 28th year of the original period of copyright?

2. Where an author dies prior to the commencement of the 28th year of the original copyright and is not survived by a widow or children, but does leave a will, does his prior *inter vivos* assignment of the renewal interest defeat the executor's right of renewal for the beneficiaries under the author's will when it is conceded that such an assignment would not defeat the renewal rights of a widow, widower, child or next of kin?

Statement

This is an action for copyright infringement involving conflicting claims of the parties (both music publishers) to ownership of a partial interest in the renewal copyright of a musical composition entitled "Moonlight and Roses (Bring Mem'ries of You)" (R. 2-6).

Both parties moved for summary judgment based on the pleadings, affidavits, and their stipulation of agreed facts (R. 22, 23). The District Court, Bryan, J., denied the motion of petitioner (plaintiff below), granted respondent's motion and rendered judgment on its counterclaim, confirming in respondent all rights in the disputed partial interest in the renewal copyright (R. 34-35; R. 24-33).

The Court of Appeals for the Second Circuit affirmed upon the written opinion of Judge Bryan, Circuit Judge Washington dissenting (R. 36-40).

Prior to January 10, 1925, Ben Black and Charles N. Daniels (also known as Neil Moret) composed "Moonlight and Roses" (R. 6-7). The authors assigned the song and the right to secure a copyright therein to Villa Moret, Inc., a music publisher. Villa Moret secured the copyright on January 10, 1925, and published or licensed the publication of the song for the balance of the original term, which expired on January 9, 1953 (R. 7). Since the original term of copyright expired on January 9, 1953, the 28th year of the original term commenced January 10, 1952.

Ben Black died testate in California on December 26, 1950, prior to the commencement of the last year of the original term of copyright when the right to apply for renewal first accrued. He left no widow or children (R. 8). His will, which was duly admitted to probate in February, 1951, provided for certain specific legacies and bequeathed the residuary estate to his nieces and nephews (R. 19-21).

On October 3, 1946, petitioner entered into an agreement with Ben Black whereby Black assigned to petitioner any and all rights "now possessed or which may at any time or times hereafter be acquired or possessed" by him, as co-author, in the renewal copyrights to 18 compositions, including "Moonlight and Roses", in consideration of petitioner's promise to pay certain royalties and the payment of $1,000 as an advance against such royalties (R. 7; R. 11-15). When said agreement was executed, Black was not possessed of the right to renew the "Moonlight and Roses" copyright and due to his death prior to January 10, 1952, Black never acquired the right to renew said copyright pursuant to the provision of § 24 of the Copyright Act which grants such right to the author.

On October 14, 1946, petitioner also obtained from the three brothers of Ben Black separate assignments of any interests they might respectively acquire in the renewal copyright of "Moonlight and Roses" or the other 17 songs (R. 8). Since Black left a will designating his nieces and nephews as residuary beneficiaries, his brothers, as his next of kin, never acquired the right to renew the "Moonlight and Roses" copyright.

The agreement between Black and petitioner did not expressly purport to bind Black's testamentary representatives and did not contain any covenant with respect to Black's testamentary dispositions.

The assignments from Black and his brothers to petitioner were recorded in the Copyright Office on October

27, 1946 (R. 8; R. 16-19). The agreements pursuant to which the assignments were obtained provided for payment of royalties, but only with respect to those songs for which petitioner actually acquired the renewal copyright.

On January 16, 1952, the executor of the Estate of Ben Black applied for and obtained a certificate of renewal registration in the copyright in "Moonlight and Roses." On March 24, 1952, as part of its decree of final distribution in the probate of the Ben Black estate, the Superior Court of the State of California in and for the City and County of San Francisco, ordered distribution of the estate's interest in "Moonlight and Roses", including the renewal copyright therein, to the nieces and nephews (R. 9).

Subsequently, under date of May 1, 1952, respondent entered into an agreement with the nieces and nephews, wherein, among other things, they assigned to respondent all of their right, title and interest in "Moonlight and Roses." This agreement was filed in the Copyright Office and also was submitted to and approved by the California Superior Court (R. 9).

Respondent had also acquired, in May, 1947, the renewal copyright interest of Charles N. Daniels, the co-author (R. 9-10). There is no dispute as to respondent's ownership of the Daniels interest, and petitioner challenges only respondent's right to the renewal copyright interest attributable to Ben Black's authorship.

Based upon its acquisition of the Daniels and Ben Black interests, respondent undertook the publication, exploitation and licensing of "Moonlight and Roses" throughout the United States upon the commencement of the renewal copyright term, it being respondent's position that it was the sole owner of the renewal copyright. This action followed.

Summary of Argument

Petitioner's claim to the renewal copyright is based on an assignment made by Ben Black prior to the last year of the 28-year term of the original copyright of "Moonlight and Roses." At the time he executed the assignment, Black did not and could not possess the renewal copyright or the right to apply therefor, since the statute, 17 U. S. C. § 24, provides that such rights exist only during the last year of the original term of copyright.

Accordingly, petitioner obtained only an assignment of a future, *contingent* right, namely, the right to the renewal if Ben Black survived into the 28th year of the original term, when for the first time the right to renewal could vest in him. Black's death prior to the commencement of the 28th year of original copyright defeated petitioner's assignment because the contingency of Black's survival failed, and the rights purportedly conveyed by the assignment never vested.

Petitioner concedes that the right to apply for and obtain a renewal copyright vests in the author's widow and/or child, despite a prior assignment of the kind petitioner obtained, if the author dies prior to the commencement of the last year of the original copyright term and is survived by a widow and/or child. Petitioner also concedes that, if neither the author, nor his widow nor children survive into the last year, and if the author does not leave a will, the renewal right vests in his next of kin despite the author's prior assignment.

Petitioner's argument, in effect, is that the statute creates (or this Court should create) an exception in the case of the renewal by an executor on behalf of the beneficiaries designated in the will, requiring them to be bound by the author's assignment of his expectancy in the renewal copyright, when concededly the author's widow, children, or next of kin are not so bound.

Petitioner's basic contention that the author's executor, "in representing the person of his testator * * * is possessed of the same power that the testator might have exercised if alive," begs the question presented herein. Judge Bryan's opinion stated the issue clearly and definitively:

> "The question presented here is whether the assignment of his renewal rights by Ben Black, one of the co-authors of the song, to plaintiff prior to the time when they accrued at the commencement of the last year of the original term of copyright was defeated by the author's death before the period within which renewal could be commenced." (R. 24)

Admittedly an executor may exercise rights which his testator might exercise if alive, with respect to property or property interests owned by the testator. Ben Black, however, never acquired any perfected or vested rights in the renewal copyright; his executor (acting on behalf of Black's nieces and nephews, as the beneficiaries under Black's will) obtained the rights by reason of the separate, independent grant of Congress to executors as a class, contained in 17 U. S. C. § 24. Ben Black's renewal rights, being contingent upon his survival into the 28th year of the original term of copyright, terminated upon his death prior to that time, and petitioner acquired nothing by virtue of its assignment from Black.

I

Ben Black, assigned to petitioner only, a future, contingent interest, a mere expectancy, which failed because of Black's death prior to the 28th year of the original copyright period.

The author, during his lifetime, has only a contingent interest in the renewal rights, a mere possibility of obtaining the renewal copyright which is dependent upon his

survival into the last year of the original copyright term. Prior to that time, the author's interest in the renewal is only an "expectancy"; and that is all that he assigned to petitioner. *DeSylva* v. *Ballentine*, 351 U. S. 570, 574 (1956); *Rossiter* v. *Vogel*, 134 F. 2d 908, 911 (2d Cir. 1943).

The opinion of the Court of Appeals for the Second Circuit in *M. Witmark & Sons* v. *Fred Fisher Music Co., Inc.*, 125 F. 2d 949, 950 (2d Cir. 1942), *aff'd* 318 U. S. 643 (1943), is persuasive on the particular point at issue here. The Court there stated that an author's assignment of his "expectancy" is dependent upon his survival into the final year of the original term, and that, in the event of the author's death prior to the final year, his assignment would not "cut off the rights of renewal extended to the widow, children, executors or next of kin * * *."

This is also the prevailing view among the text writers,* and it is the basis upon which the Courts below held that Ben Black's death prior to the commencement of the 28th year of the original period of copyright terminated his interest in the renewal, making ineffectual the assignment which petitioner acquired from him.

Petitioner concedes that an author's assignment of his expectancy will not affect the grant given by Congress to his widow and children if he does not survive into the 28th year. Similarly, petitioner concedes that, where the author dies intestate prior to the 28th year and there are no widow or children, the next of kin will obtain the renewal copyright free of any claim founded upon an assignment made by the author during his lifetime.

---

* Ball, *Law of Copyright and Literary Property* 555-56 (1944); Ladas, *International Protection of Literary and Artistic Property* 772-73 (1938); Spring, *Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising and The Theater* 95 (2d Ed. 1956).

To our knowledge there is no reported case under our copyright law (and petitioner does not contend to the contrary), in which an assignee prevailed on the basis of an *inter vivos* assignment of renewal rights by an author who failed to survive into the final year of the original term of copyright.

Respondent's position is not based upon the premise that the assignment by Ben Black to petitioner was not a valid assignment. Neither is that the premise upon which the Courts below found for respondent. The decisions below rest upon the proposition that, even if the assignment were valid, it gave nothing to petitioner because it was an assignment of a contingent, future interest which never vested in the assignor:

> "[A]n author's assignment of his renewal rights *in futuro* can effectively transfer such rights to the assignee only if the author survives until the commencement of the twenty-eight, or last, year of the original term. If the author survives he becomes vested with an absolute power to renew under the statute, and the prior contingent assignment in turn vests such renewal rights in the assignee. On the other hand, if the author fails to survive he has never become vested with any rights of renewal, such rights by statute have been vested *eo nomine* in his widow, child, executor or next of kin, as the case may be, and there is nothing which can pass by virtue of the assignment." (R. 29)

Nowhere in its brief does petitioner meet, or even come to grips with, this basic proposition, upon which the Courts below resolved this case.

II

The right of the executor to renew is created by statutory grant which is independent of the grant of renewal rights to the author. The persons for whose benefit the executor acts are entitled to the same protection and benefits as those to which the widow and children would have been entitled had they survived the author.

The right to obtain a renewal copyright and the renewal copyright itself exist as property only by virtue of Section 24 of the Copyright Act. Congress, in creating the right, provided a scheme of successive ownership of the renewal interest which is independent of and different from the general rules governing the devolution of property. The statute, moreover, is not one which prescribes rules for testamentary disposition; instead it creates new and independent rights which are owned by the person or persons it specifies.

Petitioner's contention—that the executor's right of renewal is merely that of his testator's and not of an independent grant—is erroneous. To support this position, petitioner relies heavily on *Fox Film Corporation* v. *Knowles*, 261 U. S. 326 (1923). We submit that an examination of the facts and the holding of that case fails to justify any such reliance and that the decision below does not in any manner conflict with the decision of this Court in that case.

In the *Fox Film* case, the author died prior to the last year of the original term, leaving no surviving widow or children. His executor subsequently applied for the renewal copyright. It was argued that the executor had no right to apply for and obtain the renewal because the executor could own only what the testator owned, and that the testator owned nothing since he died prior to the 28th year. This Court rejected that contention, and relying,

as respondent does, on the language of Section 24, found that the executor's renewal rights are independent of the author's rights at the time of his death, just as are the renewal rights of the other persons named in the statute. (261 U. S. at 329-30). The opinion of Mr. Justice Holmes remarks that "it is no novelty for [the executor] to be given rights that the testator could not have exercised while he lived."

Petitioner's brief (pp. 8-10) cites and quotes from *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909 (2d Cir. 1921), cert. denied, 262 U. S. 758 (1923). The decision in that case was prior to and is inconsistent with the decision of this Court in the *Fox Film* case; moreover, in the so-called "second *Silverman* case", the Court firmly adhered to the concept of the independence of the renewal grant to the classes enumerated in the statute. *Silverman* v. *Sunrise Pictures Corporation*, 290 Fed. 804 (2d Cir. 1923), cert. denied, 262 U. S. 758 (1923).

The opinion of Judge Bryan below, based upon the established concept that the renewal rights of the widow, child, executor, or next of kin exist independently of the author's rights, is consistent with and strongly supported by the rule of the *Fox Film* case.

Equally inappropriate is petitioner's reliance upon *Gibran* v. *Alfred A. Knopf, Incorporated*, 153 F. Supp. 854 (S. D. N. Y. 1957), *aff'd* 255 F. 2d 121 (2d Cir. 1958), cert. denied, 358 U. S. 828 (1958). There the author, who left neither widow nor children, did leave a will but failed to name an executor, as a result of which administrators c.t.a. were appointed. The contest was between the administrators and the next of kin for the renewal right. It was held (1) that the renewal right vested in the administrators c.t.a. because for all practical purposes they were the equivalent of an executor; and (2) that the renewal right acquired by such legal representative is acquired for the benefit of the persons designated by the testator in his will and not for the benefit of his next of kin.

The language of Judge Weinfeld's opinion (153 F. Supp. at 857-8) is significant in its emphasis on Congressional intent to protect the author's residuary legatees (represented by the executor) in the absence of a widow and/or children:

> "The House committee report (also adopted as the Senate committee report) which accompanied the renewal section prior to its enactment by the Congress shows that its purposes were first to protect the author against his own improvident conduct in surrendering renewal rights during the original term; second, to set up a statutory scheme of priority in the renewal rights for the benefit of those naturally dependent upon, and properly expectant of, the author's bounty; and third, to permit the author who had no wife or children to bequeath by will the right to apply for renewal.
>
> To construe 'executors' as used in the statute in the very strict and literal manner urged by the sister would defeat the purpose and intent of Congress to permit an author to bequeath the renewal rights. * * *"

We submit that Congress intended that, if the author is not survived by a widow or children, he be granted a "testamentary power of appointment" so that those persons whom the author regards as proper objects of his bounty are entitled to benefit from the Congressional grant of renewal rights, ahead of the author's next of kin.

Petitioner admits that an author's *inter vivos* assignment will not affect the grant of renewal copyright to his widow and children if he fails to survive into the 28th year of the original term. Similarly, petitioner concedes that where an author dies intestate prior to the commencement of the 28th year, leaving neither widow nor children, the persons who own the renewal interest are the next of kin, as the statute provides, and that a prior assignment made by the author cannot defeat that ownership.

The burden of plaintiff's argument, then, is that this Court should create an exception in the case of an executor, requiring him to be bound by the author's assignment of his expectancy. There is no authority for the creation of such an exception, either in the language of the statute or in any of the cases pertaining to copyright renewals. Under the statute, the right to apply for and obtain the renewal copyright devolved upon the executor, who was obligated to exercise such right for the benefit of Ben Black's nieces and nephews.

As the District Court said:

> "The statute does not differentiate between rights which it vests in the widow and the children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those other persons named therein." (R. 29)

In arguing that the decisions below conflict with this Court's ruling in *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U. S. 643 (1943), petitioner misconstrues both the holding of Judge Bryan's opinion and the reasoning behind it. In *Fisher* v. *Witmark,* the author survived into the renewal term, having made conflicting assignments of the renewal copyright, one prior to the 28th year of the original term and the other after the renewal right vested. This Court held that the prior assignment prevailed because the Copyright Act does not nullify an agreement by an author, made during the original copyright term, to assign his renewal, where the author survived into the 28th year.

As we have heretofore urged, Judge Bryan's opinion does not invalidate the asignment by Black to petitioner, but holds instead that, by reason of his death prior to the 28th year, Black never acquired any perfected interest in the renewal which could pass by virtue of his assignment. Petitioner's argument that an executor might exercise the same power that the testator could have exercised if he

had been alive does not recognize the underlying concept of Judge Bryan's opinion, which is that the decedent did not own any assignable property, because the contingent future interest granted to him by Congress was terminated by his death prior to the vesting of the right.

Petitioner further maintains that the Courts below erred in finding that executors "take for themselves personally and beneficially". That was not, in any sense, the holding below, and respondent has never maintained that an executor acts for his own benefit or for himself personally. The executor acts to implement the testamentary power of appointment granted the author by Congress, and Judge Bryan held that in so doing, the executor is not bound by the testator's prior assignment of the renewal that he would have owned had he survived into the 28th year of the original term of copyright.

The Court below stated:

> "Plaintiff concedes that when an author fails to survive until the commencement of the last year of the original term, any prior assignment by him is void as against the widow, children and next of kin. But it contends that this is not true as to the executor, because an executor stands in the shoes of his testator and is bound to carry out any agreements entered into by the testator during his lifetime. I cannot agree with this contention. The statute does not differentiate between rights which it vests in the widow and children, the executor and the next of kin successively. There is nothing in the statute indicating that the rights of the executor are any different from those of the other persons named therein. The executor's right to renew in the event that neither the author nor his widow and children survive at the commencement of the renewal period is not a derivative right arising under general testamentary law. It is rather a right arising from the statute itself which has created the right in its own express and limited terms. Since, as has been pointed out, no such right exists apart from the statute, the right cannot be taken away unless the statute expressly

so provides. This Congress has not seen fit to do. * * * This statutory scheme, in derogation of the ordinary law of succession is a further indication that the right of renewal does not belong to the author's estate by right of succession, but belongs only to the appropriate person designated in the statute, in this case the executor, who would in turn be obligated to apply for the renewal and distribute the rights so acquired in accordance with the terms of the will." (R. 29-30)

We submit that Congress, by granting the contingent right to renew to the "next of kin" (a right which cannot be defeated by the author's prior assignment) and by placing the executor ahead of the next of kin in setting forth the hierarchy of persons entitled to renewal rights, evidenced its intent to enable the author to designate by will the persons entitled to receive the renewal rights which Congress created, if there are no surviving widow or children.

III

All assignees of future rights to renewal copyrights accept the risk that the rights acquired from their assignors may not vest because of circumstances which can defeat the expectancy.

The very nature of the statutory grant created by Section 24 of the Copyright Act of an additional renewal term of copyright protection is such that, until the accrual of the renewal right in the 28th year of the original term, the classes named have only an expectancy. Congress has specified which persons shall be entitled to the renewal when the expectancy is perfected upon accrual of the right.

Until accrual of the right in one class or another according to the then existing circumstances, assignees of the renewals from any given person or class of persons take the risk that the rights acquired may never vest.

Petitioner urges that this is inequitable because an executor, who assumes his office only after the testator's death, is the only person who cannot join in a prior assignment. This contention, also made in Judge Washington's dissenting opinion below (R. 39), does not take into account the fact that prior to the 28th year of the original copyright, an assignee of the future right cannot acquire assurance that the rights he has purchased will not be defeated, regardless of the amount of money he is willing to pay and the number of persons from whom he is willing to purchase such contingent future rights. Any one of a great number of circumstances may intervene to nullify the assignment. An assignee can seek to protect the assignment of renewal rights from a married author by making a payment to his wife for her concurrent assignment; however, prior to the author's death and the vesting of the renewal rights, a divorce and subsequent remarriage may intervene. Without question, had Ben Black married subsequent to his agreement with petitioner, and his wife survived into the 28th year, neither petitioner's assignments nor those obtained by respondent would have conveyed any rights whatever.

A person acquiring assignments of the future contingent renewal rights from the children of an author may have to face the contingency that the author may sire additional children. In the instant case, petitioner obtained assignments from Ben Black's brothers upon the assumption that they would continue to be Black's next of kin at the time the renewal rights vested; it is obvious, however, that in many cases the persons who constitute the next of kin for renewal purposes cannot be determined until after the author's death and the commencement of the 28th year of the original term of copyright.

We submit that it is therefore erroneous to say that the executor is "the only person who can absolutely defeat the right of the prior assignee." If an assignment of renewal rights is obtained prior to the vesting thereof, the assignee's rights can be and often are defeated by the

application of the language of the statute to changing and unpredictable circumstances.

In the instant case, the Courts below considered the argument that it might seem "incongruous" to allow an author who has no widow or children to defeat his prior assignment by leaving a will. As Judge Bryan said, this is an argument which should be addressed to Congress, not the Courts, "[f]or there is nothing in the language used by Congress which permits a contrary conclusion" [R. 32].

We think it obvious that an assignee of any contingent future interest must necessarily take the gamble that the condition precedent to the vesting of such future interest may well not occur. The price paid for the assignment of a contingent, future right to the renewal copyright would vary as a result of many factors, including the age and health of the people involved. It seems entirely probable that plaintiff agreed to pay the relatively small sum of $1,000 for the future renewal rights of 18 songs (and conditioned its agreement to pay royalties upon its actual acquisition of Ben Black's interest in the renewal copyrights) because it recognized the contingent nature of the rights acquired.

We therefore submit that petitioner knew, or should be charged with the knowledge, of the risks it was taking when it acquired Ben Black's contingent future right to renew the copyright in "Moonlight and Roses." Recognizing these risks, it to some extent attempted to fill the gaps by obtaining assignments from Black's brothers. However, petitioner in any event could not have assurance that it would acquire the renewal copyright because of possible changes in circumstances as to what persons will constitute the widow and/or children of the author.

IV

Insofar as petitioner claims the renewal copyright interest as a person entitled to distribution of the assets of Ben Black's estate, the California decree of final distribution to respondent's assignors is conclusive.

The opinion of Judge Bryan, adopted by the Court below, concludes that, under California law, "one who claims as a stranger to the estate or adversely to the estate rather than as an heir, devisee or legatee, will not be bound by a decree of distribution since the jurisdiction of the probate court is limited to rights granted in privity with the estate and does not extend to the rights or titles of adverse claimants" (R. 27).

Although we acquiesce in this statement of California law, we believe that Judge Bryan misconstrued our contention with respect thereto.

Petitioner seems to imply, and Judge Washington's dissenting opinion below seems to adopt, the position that petitioner's agreement with Ben Black, dated October 3, 1946, was tantamount to a contract which required Ben Black to designate petitioner as the beneficiary of his will as to the renewal copyrights. In its complaint, petitioner went further, and alleged that Black "bequeathed by Will" the right of his executor "to apply for the renewal of said copyright in said musical composition for and on behalf of plaintiff" (R. 3).

While petitioner has apparently abandoned this latter position, it is clear that petitioner, as a devisee rather than a stranger to the estate, would be bound by the decree of distribution.

As to the former contention, that an agreement to bequeath the renewal rights was involved, we submit that neither the District Court's opinion nor its order and judgment makes any findings in support thereof. Nor has the

validity or enforceability of such a contract been briefed or argued. To the extent indicated, it should be determined by the law of the deceased author's domicile. See *DeSylva v. Ballentine*, 351 U. S. 570, 580-82 (1956).

Conclusion

The assignment from Ben Black to petitioner, being of a contingent, expectant interest in the renewal copyright, failed by reason of the author's death prior to the commencement of the final year of the original term of copyright. The author's executor renewed the copyright under an independent grant from Congress to executors as a class. The statute does not distinguish between (1) the widow, children and next of kin, who take the renewal free of any assignment by the author during his lifetime, and (2) the persons for whose benefit the executor acts. The judgment of the Court below should accordingly be affirmed.

Insofar as the Court may find petitioner was a party interested in Ben Black's estate, the cause must be remanded for further proceedings in the District Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 214

MILLER MUSIC CORPORATION,

Petitioner,

against

CHARLES N. DANIELS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

POINT I

Respondent's argument is predicated upon the same premise as the determination of the Courts below that, the author having failed to survive the renewal period, he could not effectuate any disposition of a right which never came into being. Such theory has been rejected by this Court.

In expounding this theory the respondent says (pp. 7, 8) "The author, during his lifetime, has only a contingent interest in the renewal rights, • • • which is dependent

upon his survival into the last year of the original copyright term. • • • This is also the prevailing view among text writers (citing 'Ball, Law of Copyright and Literary Property' and 'Ladas International Protection of Literary and Artistic Property') and it is the basis upon which the Courts below held that Ben Black's death prior to the commencement of the 28th year of the original period of copyright terminated his interest in the renewal, • • • ."

The District Court said "In the light of the policy of the act with respect to renewal rights 'expectancy' means that any right to renewal which the author may have is entirely contingent upon the author's survival until the commencement of the twenty-eighth year" (likewise citing Ball and Ladas, *supra*; R. 29, 32). Both Ball and Ladas took the same position that, prior to the accrual of the right of renewal, the author cannot make any disposition thereof either by assignment or bequest.

Thus Ball says (p. 557), in speaking of an author's disposition of a renewal expectancy, either by assignment or will:

> "One cannot grant personal property in which he has no existing title or vested right. Consequently an expectancy in or growing out of property cannot be the subject of an assignment at law, or of a valid mortgage sale; nor be devised by will."

Ladas says to the same effect (p. 773) "The author cannot dispose of rights he may never have."

In *Fox Film Corporation* v. *Knowles*, 274 Fed. 731 (D.C.E.D.N.Y.), affd. 279 Fed. 1018 (Cir. 2), rev. 261 U. S. 326, 43 Sup. Ct. 365, the determination of the District Court (pp. 733, 734) was on the same premise, that the author having failed to survive the renewal period any disposition made by him of the renewal, either by assignment or bequest, was ineffective because he had nothing

to leave. In this respect the District Court said (p. 734) that the author having died prior to the renewal period "He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived."

The Court of Appeals affirmed the decree of the District Court, on the authority of its prior determination in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, cer. den. 262 U. S. 758, 43 Sup. Ct. 705. In that case the determination of the Court of Appeals was predicated upon the same premise as respondent's argument and the determination of the Courts below in the instant case, that the author having failed to survive the renewal period could not effect any disposition, whether by assignment or bequest, of a right which never came into being. The Court of Appeals said to such effect (p. 913) that while "what may be assigned could ordinarily be devised," the author having failed to survive the renewal period he "had as yet nothing to leave," but that if the author had lived to within such period he may "exercise his right to assign it, or bequeath it."

Upon the appeal to this Court the respondent in the *Fox Film* case likewise advanced the identical argument as the respondent herein (p. 327) that "neither the author nor his assignee possesses any right or power that may be transferred to run beyond a period of 28 years. . . . This new property right (renewal) however, does not come into being until the beginning of the last year of the original copyright. Not until then has the author any estate or right."

This Court determined to the contrary (p. 330):

> "We should not have derived that notion from the section, which seems to us to have the broad interest that we have expressed, and the words specially applicable seem to us plainly to import that if there is

no widow or child the executo. may exercise the power that the testator might have exercised if he had been alive."

It will be noted that the determination of this Court was not confined to the author's disposition by bequest, but on the contrary was in refutation of the broad argument there advanced, as here, that the author having failed to survive the renewal period, he could not make any disposition of a right of which he was never possessed.

The respondent recognizes (p. 11) that the theory adopted by the Court of Appeals in the *Silverman* case, upon which the argument of the respondent in this court in the *Fox Film* case was predicated, and upon which premise the respondent bases its argument herein, "is inconsistent with the decision of this Court in the Fox Film case." Petitioner in its brief (p. 9) quotes from the aforesaid determination of this Court in the *Fox Film* case, "that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive." However, respondent would reject such holding of this Court, as being contrary to the "underlying concept of Judge Bryan's opinion," in saying (pp. 13, 14), "Petitioner's argument that" (if there is no widow or child) "an executor might exercise the same power that the testator could have exercised if he had been alive does not recognize the underlying concept of Judge Bryan's opinion, which is that the decedent did not own any assignable property, because the contingent future interest granted to him by Congress was terminated by his death prior to the vesting of the right."

In *Gibran* v. *Alfred A. Knopf, Incorporated*, 153 F. Supp. 854 (D.C.S.D.N.Y.), affd. 255 F. 2d 121 (Cir. 2), cer. den. 358 U. S. 828, 79 Sup. Ct. 46, it was likewise contended (pp. 859, 860) that, as the author's contingent interest was terminated by his death prior to the vesting of the

right, his sole right under the statute was "to name an executor to apply for renewal." The District Court, in basing its determination upon the holding, *supra*, of this Court in the *Fox Film* case, said (p. 860):

> "The contended for construction would deprive an author, if he died without surviving spouse or children, of the right to dispose of renewal copyrights, contrary to congressional intent."

POINT II.

There is no foundation for respondent's argument that the rights of the executor being derived solely from the statute and independent of any rights of the author, in the same category as those of the widow, children and next of kin, they cannot be defeated by any act of the author.

In an attempt to circumvent the argument under "Point I" of its brief that if the author does not survive the renewal period he cannot effectuate any disposition, either by assignment or devise, of a right which never comes into being, respondent contrives the groundless theory that the rights of the executor are derived solely from the statute and independent of any rights of the author.

The respondent says to this effect (p. 11) that the rights created by the statute are "owned" by the executor and other persons specified; (p. 11) that the opinion of Judge Bryan is based upon the concept "that the renewal rights of the widow, child, executor, or next of kin exist independently of the author's rights"; (p. 13, quoting from Judge Bryan's opinion) that the statute "does not differentiate between rights which it vests in the widow and the children, the executor and the next of kin successively," as there "is nothing in the statute indicating that the rights of the executor are any different

from those other persons named therein"; and (p. 14, quoting from Judge Bryan's opinion) that "as no such right exists apart from the statute, the right cannot be taken away unless the statute expressly so provides."

This contention of respondent is the same as raised by it in the District Court. As Judge Bryan said in his opinion (R. 28) "Defendant contends that since the designated persons, including the executor, derive their interest solely and directly from the statute, the author may not, by prior assignment, deprive any of them of the rights which the statute expressly grants them."

In accord with this contention, the District Court held (R. 32), "I conclude that the executor has the same rights under the statute as the widow and children or next of kin. His right to renew is completely independent of what the author's rights were at the time of his decease." This holding was adopted by the majority of the Court of Appeals (R. 36).

Only the widow, widower, or children, or in the absence of a will the author's next of kin, "derive their interest solely and directly from the statute" and "completely independent of what the author's rights were at the time of his decease." In *De Sylva* v. *Ballentine*, 351 U. S. 570, 582, 76 Sup. Ct. 974, this Court, in noting that the only restraint under § 24 upon an author's right to "assign" his renewal interest was for the protection of his widow and children, said "Since the author cannot assign his family's renewal rights, § 24 takes the form of a compulsory bequest of the copyright to the designated persons."

The renewal rights are not "owned" by the executor, as respondent would contend (p. 11), nor are the same rights "vested" in the executor as in the widow, children, and next of kin, as held by Judge Bryan (R. 29). As Judge Washington said in his dissenting opinion (R. 38, 39),

while the statute includes the executor in the class of persons entitled to apply for the renewal, this "cannot mean that Congress intended the executor to take personally and beneficially, as in the case of a widow and child. 'The executor represents the person of his testator' . . . Fox Film Corp. v. Knowles, 261 U. S. 330."

The executor certainly does not derive his interest "solely and directly from the statute" and "completely independent of what the author's rights were at the time of his decease." It was only by virtue of the author's rights at the time of his decease, in the absence of a wife or children, that the executor was designated by him to effectuate the disposition of his renewal interest, *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U. S. 643, 655, 63 Sup. Ct. 773. Respondent defeats its own argument (p. 12) when, in speaking of the significance of the "Congressional intent" in enacting the renewal provision, it quotes from the opinion of the District Court in *Gibran* v. *Alfred A. Knopf, Incorporated, supra* (pp. 857, 858), wherein the court refers to the House Committee report which specifically expressed the intention of § 24 (former § 23) "to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." Accordingly, the executor could not possibly take office or function, independent of the author's rights at the time of his decease.

The respondent says in conclusion (p. 19), "The statute does not distinguish between (1) the widow, children and next of kin, who take the renewal free of any assignment by the author during his lifetime, and (2) the persons for whose benefit the executor acts." The assignee, as well as the beneficiaries, take through the author, and the executor, in the absence of a widow or children, is merely a conduit for effecting the author's disposition of the renewal interest. For, as this Court said in the *Fox Film* case, *supra*, if there is no widow or child "The executor represents the person of his testator."

As Judge Washington said in his dissenting opinion (R. 39) "For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath these rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs. In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—a contract which was clearly 'valid and enforceable' under the Fisher case" (*Fred Fisher Music Co.* v. *M. Witmark & Sons, supra*).

POINT III

Respondent argues that all assignees of future renewal rights must accept the risk that such rights can be defeated under the purview of the statute by virtue of possible changes in circumstances as to what persons will constitute the widow and/or children of the author. However, this does not justify respondent's contention that an author, having no widow or children, has the power to nullify his own prior assignment.

In support of this argument respondent says (pp. 16, 17) "If an assignment of renewal rights is obtained prior to the vesting thereof, the assignee's rights can be and often are defeated by the applicable language of the statute to changing and unpredictable circumstances" since petitioner "could not have assurance that it would acquire the renewal copyright because of possible changes in circumstances as to what persons will constitute the widow and/or children of the author."

How can this possibly justify the author's defeating his own assignment? The respondent fails to point to anything in the language of the Act, or in the history of its

enactment, to indicate any intention on the part of Congress to give the author himself the power to nullify his own prior assignment.

As Judge Washington said in his dissenting opinion (R. 36, 37):

> "In his opinion below, Judge Bryan recognizes that it may be 'incongruous to allow an author who has no widow or children to defeat his prior assignment by executing a will, the terms of which are in derogation of the assignment * * *' 158 F. Supp. 188, 194 (S.D.N.Y. 1957). In my view, such a result is not only incongruous but without legal justification."

CONCLUSION

Petitioner respectfully submits that the judgment should be reversed.

Dated: New York, N. Y., January 28, 1960.

Respectfully submitted,

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